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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company (Panhandle) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this cause on April 27, 1956, affirming Opinion No. 274, and related orders, of the Federal Power Commission.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)[1] and a note of the denial of rehearing (App. 12a) are reported at 232 F. 2d 467. No opinion accompanied the denial of rehearing. Opinion No. 274 and accompanying order (R. 3923-3962)[2] and the order modifying and affirming Opinion No. 274 (R. 3991-3994) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (App. 11a) was entered April 27, 1956. Panhandle filed a timely petition for rehearing which was denied June 5, 1956 (App. 12a).

Jurisdiction is conferred upon this Court by 62 Stat. 928 (1948), 28 U.S.C., Section 1254(1) and Section 19(b), Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

(1) Whether the Natural Gas Act permits the Federal Power Commission to regulate or prohibit direct sales (including sales regularly made for many years) of gas by a natural-gas company to consumers for consumption and not for resale, where the record clearly shows that such direct sales do not interfere with the company's interstate service for resale.

(2) Whether the Federal Power Commission may deny a natural-gas company the right to effect changes

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[1] "App." references are to the printed appendix following this petition.

[2] "R." references are to the joint appendix prepared for the court below, copies of which are filed with this petition.

in its rate schedules in the manner prescribed in Sections 4(d) and 4(e) of the Natural Gas Act, where no contract or existing service rights are affected.

STATUTE INVOLVED

The statutory provisions involved are Sections 1(b), 2(6), 4(d), 4(e), 7(c) and 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C., Section 717 *et seq.* These provisions are printed in the appendix to this petition at pages 12a-16a.

STATEMENT OF THE CASE

Panhandle is a "natural-gas company" under the Natural Gas Act. It produces and purchases natural gas in Texas, Oklahoma and Kansas, and it owns and operates a gas transmission pipeline system extending from Texas through Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio to termini in Michigan. It is engaged in the transportation and sale of natural gas in interstate commerce to approximately 50 distributing utilities located along its pipeline system for resale and directly to numerous industries and others for their own use.

At various dates between December 16, 1952, and May 21, 1954, the Federal Power Commission (Commission) heard proceedings in nine dockets involving Panhandle. These nine dockets were consolidated by the Commission's order of January 15, 1954 (R. 4265-4267). Insofar as they are relevant here, these dockets concerned in general (1) Panhandle's direct sales, both established and proposed, and (2) the cancellation or modification of Panhandle's Interruptible Rate Schedules (I Schedules).

Panhandle's Direct Sales

Four of the dockets (G-2035, G-2040, G-2049 and G-2050) in the consolidated proceedings related to proposed direct service of gas by Panhandle to four new customers: Mrs. Tucker's Foods, Inc. (Mrs. Tucker), Bohn Aluminum and Brass Corporation (Bohn), DeKalb Agricultural Association, Inc. (DeKalb), and Monroe Paper Products Company (Monroe Paper). Panhandle entered into contracts for the sale and delivery of gas to the respective plants of those customers and applied to the Commission for disclaimers of jurisdiction, or, in the alternative, for certificates of public convenience and necessity (R. 3772, 3996, 4095 and 4136). Docket No. G-2048 related to Panhandle's application for a certificate of public convenience and necessity authorizing the construction of a new loop to its pipeline serving Adrian, Michigan, to permit, at times of peak demand, the service to Bohn contemplated by the application in Docket No. G-2040, and to provide additional capacity for future increases in requirements anticipated by the local utility in Adrian (R. 4082-4088).

Panhandle also had entered into a contract with Mueller Brass Company (Mueller) calling for the direct sale of gas for use in Mueller's plant at Port Huron, Michigan (Ex. 37, R. 2570-2574). This direct sale was begun without prior application to, or issuance of certificate by, the Commission (R. 433). Docket No. G-2091 was initiated by the Commission with reference to this direct sale and to the maintenance by Panhandle of priorities of service for direct sales which differ from those provided in its rate schedules applicable to interstate sales for resale (R. 4204-4211).

Docket No. G-2301 was initiated by order of the Commission directing Panhandle to show cause why it should not be required to sell gas to the utilities serving Bohn, DeKalb, Monroe Paper and Mueller, so that these utilities could resell such gas to these consumers in place of Panhandle's direct sales to them (R. 4262-4264).

Each of the proposed direct sales, and the direct sale to Mueller, was considered, approved and authorized by the state and local authorities having jurisdiction over such service. The sales to Mrs. Tucker and DeKalb were considered by the Illinois Commerce Commission, the only Illinois agency with jurisdiction in such matters. The Illinois Commission found that the public convenience and necessity require the sales and authorized Panhandle to make them under and in accordance with its contracts (R. 2507-2512 and 2546-2551). The Michigan Public Service Commission found that the proposed sales to Bohn, Monroe Paper and Mueller would serve the public convenience and necessity and authorized Panhandle to make those sales in accordance with its applicable contracts, and each of the cities in which those sales are to be made approved them (R. 2533-2537, 2563-2566 and 2580-2585). The contract for each of the direct sales here involved is expressly subjected to interruption to protect Panhandle's firm service to utility customers who purchase such gas for resale (R. 2505, 2517, 2541, 2557 and 2572).

Panhandle's I Schedules

Docket No. G-2073 was initiated by the Commission to determine (so far as is pertinent to this case) whether Panhandle's I Schedules should be modified,

revised or changed (R. 4188-4192). Subsequently, in initiating Docket No. G-2301, the Commission suggested that Panhandle may have violated the I Schedules by making direct sales (R. 4262). This suggestion was directly contrary to assurances Panhandle had received immediately after the promulgation of its tariff, including the I Schedules (R. 1445), and to the decision of the Commission in Docket No. G-1767, originally one of the dockets in these consolidated proceedings. Confronted with that change of position on the part of the Commission, Panhandle filed on December 15, 1953, revised tariff sheets canceling the I Schedules as of January 18, 1954 (R. 4268-4272). On January 15, 1954, the Commission suspended the revised tariff sheets "until such time as said revised tariff sheets may be made effective in the manner prescribed by the Natural Gas Act," established Docket No. G-2349 as the docket involving such cancellation and consolidated that docket with the other dockets in this case (R. 4265-4267).

On June 21, 1954, the proceeding in Docket No. G-2349 not having been concluded and there being no order therein, Panhandle filed a motion pursuant to Section 4(e) of the Act to make the revised tariff sheets effective (R. 4293-4299). On July 15, 1954, the Commission issued an order denying this motion (R. 4329-4330).

The Commission's Order of July 28, 1954, and Its Opinion No. 274

In its order of July 28, 1954, accompanying Opinion No. 274 (R. 3923-3962), the Commission (1) ordered Panhandle not to render service to its direct sale customers under any classifications of service not in-

cluded in its filed tariff for resale service, (2) denied the cancellation of the I Schedules and modified such schedules so as to make them apply to and regulate all of Panhandle's direct sales, whether long established or new, (3) asserted jurisdiction over the proposed direct sales and authorized such sales, on an interruptible basis only, to Mrs. Tucker and DeKalb, and denied such service to Bohn and Monroe Paper, (4) ordered Panhandle to sell and deliver natural gas to the local utility at Adrian, Michigan, for resale to Bohn in place of direct service to that industry, and (5) ordered Panhandle not to use its facilities to transport and deliver natural gas to Mueller without first obtaining authorization therefor from the Commission. The Commission based its denial of service to Monroe Paper on its finding that the public convenience and necessity do not require the service (R. 3951). That finding is directly contrary to the specific findings of the Michigan Commission (R. 2565) and of the City of Monroe (R. 2565).

Panhandle filed appropriate petitions for rehearing (R. 3966-3986 and 4331-4338). On November 9, 1954, the Commission denied these petitions (R. 3991-3994) and modified and affirmed, as modified, its Opinion No. 274 and the accompanying order of July 28, 1954. The modification, so far as pertinent to any issue in this review, relates to Paragraph (M) of the order. In its original form that paragraph read:

> "(M) Panhandle shall render no service to either its direct or resale customers under classifications of service not provided for in Section 16 of the General Terms and Conditions of its FPC Gas Tariff, Original Volume No. 1."

As amended, it reads:

> "(M) The facilities of Panhandle shall not be employed to transport gas either to its direct or resale customers under priorities not provided for in Section 16 of the General Terms and Conditions of its FPC Gas Tariff, Original Volume No. 1."

Opinion of the Court of Appeals

The United States Court of Appeals for the Third Circuit upheld the Commission's orders (App. 1a). The court held that the Commission had not improperly asserted jurisdiction over direct sales or wrongfully prevented changes in Panhandle's rate schedules from becoming effective. Despite the development of Paragraph (M) of the Commission's order, and despite the Commission's modification of Panhandle's I Schedules, the court found that the Commission was not seeking to require Panhandle to make its rate schedules applicable to direct sales (App. 5a). The Commission's actions were approved by the court as valid exercises of the Commission's jurisdiction over the transportation of gas.

In its support of the Commission's refusal to permit Panhandle's revised tariff sheets to become effective, the court found that the tariff had been promulgated by the Commission in an earlier comprehensive proceeding, that the order in that proceeding had become final and Panhandle had not sought to reopen it, and that accordingly Panhandle could not change its tariff in the manner prescribed in Section 4 of the Act.

The court made no attempt to justify the impact of the Commission's order on Panhandle's long-established direct sales, although Paragraph (M) of the order and the modification of Panhandle's I Schedules will specifically subject such direct sales

to regulation by the Commission. Although the record does not contain any showing, or even a suggestion, that this regulation of long-standing direct service is needed to protect Panhandle's service to its resale customers, and although this extension of the Commission's control to such direct sales is not a part of any certificate proceeding, the court sustained the Commission without attempting to show how this impact of its order fits within any of the powers which Congress has vested in the Commission. Further, the court did not refer to any portion of the record which can support its implicit conclusion that the new direct sales proposed by Panhandle would impair its ability to serve its utility customers. It completely overlooks the contract provisions which make each such sale subordinate to Panhandle's obligations to its utility customers. Finally, the court made no attempt to support its apparent conclusion that the grant to the Commission of jurisdiction over the transportation of natural gas in some manner overrides the clear and purposeful denial in Section 1 of the Natural Gas Act of Commission jurisdiction over direct sales.

ARGUMENT

The decision which Panhandle asks this Court to review presents two questions of important consequence in the administration of the Act. Neither question has been considered by this Court in the particular fact situation presented here, but Panhandle respectfully suggests that principles enunciated by this Court in prior decisions are in conflict with, and preclude the result reached in, the decision of this case by the court below. One of these questions is common to all of the proceedings initially heard by

the Commission, and that is whether the Commission has jurisdiction to regulate direct sales, both long established and new, of gas by a natural-gas company to consumers for consumptive use only. The second question is whether the Commission properly may deny the motion of a natural-gas company to revise its tariff sheets in accordance with the applicable provisions of Section 4 of the Act. The lower court has answered both of these questions in the affirmative and thus has presented compelling reasons for this Court to review its decision.

The Decision Would Permit the Commission to Regulate Panhandle's Direct Sales, Including Sales Regularly Made for Many Years, Contrary to the Provisions of Section 1(b) of the Act

The decision of the court below sustains an effort of the Commission to regulate direct sales of a natural-gas company, including sales which the company has made since prior to the passage of the Act. This extension of the Commission's powers is completely without support in the Act and it is contrary to the decisions of this Court which have consistently interpreted Section 1(b) of the Act as removing direct sales from the jurisdiction of the Commission and leaving them subject to regulation by the states. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 68 S. Ct. 190 (1947); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S. Ct. 1251 (1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 71 S. Ct. 777 (1951); *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31 (1954), *cert. denied*, 349 U.S. 920, 75 S. Ct. 660 (1955).

Section 1(b) defines and limits the application of the Act in the following words:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Italics supplied.)

Both the Commission and the court below have couched their orders and opinions in words which purport to recognize the exclusion of direct sales from the jurisdiction of the Commission. However, the limitation expressed in the Act is not to be avoided by the careful choice of words. The Act is disregarded, no matter what words may be used, if *in fact* the Commission regulates direct sales under the guise of exercising some other power granted to it by the Act. That is the situation here.

The underlying intent, and the actual impact and effect, of the Commission's orders in this case are to regulate and control direct sales. This is demonstrated quite clearly by the evolution of Paragraph (M) in the orders of July 28, 1954, and November 9, 1954. As originally written, Paragraph (M) directed Panhandle to limit its direct service to classifications prescribed in its tariff for resale service (R. 3957). In its petition for rehearing, Panhandle challenged this direction as an evident attempt to regulate direct

sales. As a result of this challenge, the Commission, in its order of November 9, 1954, changed the language of Paragraph (M) so as to direct Panhandle not to employ its facilities to transport gas to direct-sale customers except under priorities provided for its resale service (R. 3994). This change of language does not change the effect of Paragraph (M). Both versions of that paragraph regulate Panhandle's direct sales. That was the intent, and that is the result. The development of Paragraph (M) strikes down the contention that the Commission seeks only to regulate the transportation of gas.

The changes prescribed by the Commission in the I Schedules further demonstrate that the order of July 28, 1954, is intended to regulate and control direct sales. As originally promulgated in 1951, the provisions of those schedules, including the provisions for the interruption of service, were expressly limited to "service hereunder" (R. 2866). The service so encompassed was service for resale only. Paragraph 2 of each of the I Schedules makes this clear; it provides:

> "This rate schedule shall apply to natural gas delivered by Seller to Buyer on an interruptible basis in excess of Buyer's Contract Demand. Gas sold and purchased hereunder shall be gas for resale for ultimate public consumption." (R. 2865.)

This limitation of the I Schedules was confirmed by the Commission in its order of October 23, 1953, affirming the intermediate decision of the Examiner in Docket No. G-1767, originally one of the dockets in the consolidated proceedings here involved. In that decision it is specifically stated:

> "The Tariff, however, only provides for service to resale customers exclusively, and that portion (Schedules I-1, I-2, and I-3, original sheets 27-32) which applies to interruptible service is likewise solely for resale customers * * *."

However, in the course of these proceedings, the Commission has sought to amend paragraph 7 of the I Schedules so as to extend those schedules to regulate and control the interruption of all direct sales, even including direct sales which Panhandle has been making for many years. The new provision which the Commission added by its order of July 28, 1954, is:

> "* * * All gas sold on an interruptible basis to both direct and resale customers may be interrupted at any time and in any amount in the sole discretion of Seller but only after reasonable notice to Buyers and direct customers and upon a non-discriminatory and non-preferential basis. * * *"

It cannot be seriously contended that this express regulation of direct sales has any relationship to transportation or to any certificate condition. It is not limited to sales proposed now or to be proposed in the future. It is a patent effort to regulate all of Panhandle's direct sales. Its effect would be to destroy or impair the direct services to many of Panhandle's industrial customers who have been served by Panhandle since long before the passage of the Act.

The lower court itself, in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (1950), previously struck down a similar effort by the Commission to require direct sales to conform to tariffs promulgated for the resale business of a natural-gas company. The distinction offered by the court is that the *Colorado* case involved only an effort to

control rates for direct sales. But the fact is that in the *Colorado* case, the Commission directed Colorado to omit from its tariff words limiting the tariff to sales for resale. That order of the Commission would have subjected direct sales generally to the provisions of the company's tariff and the court struck it down as an unlawful regulation of direct sales. The principle observed and followed by the lower court in the *Colorado* case is the correct one, and the course which it followed here is unsound. The Act denies the Commission power over direct sales; the power which Congress saw fit to withhold is not limited to the rates charged for direct sales. If the Commission could validly require direct sales to conform to the classifications or priorities of service which the Commission has prescribed for the resale business of a natural-gas company, it could exercise all other incidents of regulation respecting such sales, including the fixing of rates. The answer is that the Commission cannot extend its regulatory activities to such sales. This is most clearly so where, as here, the record facts clearly establish that none of the sales, either those long made or those proposed, would have any adverse effect on Panhandle's resale service.

Each of the direct sales for which Panhandle sought disclaimers of jurisdiction from the Commission was found by the local authority (or authorities) having jurisdiction over the service to be in the public interest. In each case the local authority has authorized Panhandle to perform in the manner called for by its contract. The Commission has ignored these findings of the local authorities as to public convenience and necessity, and has prohibited or limited the proposed services. This disregard for the findings of the local authorities is illustrated by the Commission's decision

denying Panhandle the right to make a direct sale to Monroe Paper Products Company at Monroe, Michigan (R. 3951). The Commission made no suggestion (and the record would not support any such suggestion) that the prohibition of that direct sale is needed for effective regulation of Panhandle's transportation or to prevent impairment of any service to Panhandle's resale customers. Instead, it reopened the question of public convenience and necessity and concluded that the direct sale would not be "in the public interest" (R. 3941), despite the opposite conclusion reached by the local authorities with whom Congress intentionally left the power to resolve such local issues. The approval by the lower court of this unlawful and unwarranted action is in direct conflict with the decision of this Court in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 71 S. Ct. 777 (1951). If the Commission is allowed to enter the local field left by the Act to the states, the result will be confusion and conflict. For all practical purposes the power reserved by the Act to the local authorities will be destroyed.

The lower court concluded that the Commission has an "independent" control over gas transportation despite its lack of jurisdiction over direct sales. Panhandle has no quarrel with this conclusion. The same provision of the Act (Section 1(b)) grants the Commission jurisdiction over transportation and denies it jurisdiction of direct sales. The Commission's "independent" control over gas transportation does not permit it to regulate the direct sales of a natural-gas company. The decision of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S. Ct. 1251 (1949), illustrates the

controlling principle. Further, the record in this case clearly shows that the direct sales here involved cannot impair the Commission's regulation of transportation. None of them involves any transportation not already performed; they involve only the sale of gas at points where it already is placed. The lower court's acceptance of the Commission's contention that its power over transportation permits it to regulate direct sales completely vitiates the jurisdictional limitations so carefully and explicitly written into the Act by Congress. If the decision is upheld there will be no obstacle to the Commission's exertion of this "authority" in the case of all natural-gas companies.

The opinion of the lower court would strip from the states everything but the mere power to fix rates for direct sales of natural gas. Congress did not intend this result when it enacted the Natural Gas Act, and this Court has never considered the states' regulatory power over direct sales as being thus limited. If the lower court's opinion is sustained, the way will be open for the Commission to take over the control of direct sale rates by devices similar to those which it has employed here. The extension of the Commission's authority to direct sales requires Congressional action. The courts cannot perform this legislative function. *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F.2d 31, 33 (1954), *cert. denied* 349 U.S. 920, 75 S.Ct. 660 (1955).

The Denial by the Commission of Panhandle's Motion to Make Effective Its Revised Tariff Sheets Is Unlawful

Despite Panhandle's full compliance with every requirement of Sections 4(d) and 4(e) of the Act, the Commission denied Panhandle's motion to put into

effect its revised tariff sheets canceling the I Schedules (R. 4329). This refusal to permit the revised tariff sheets to go into effect was approved by the Court of Appeals. There is thus presented a problem of vital importance in the interpretation and administration of the Act. The decision, if permitted to stand, will have far-reaching impact upon the natural-gas industry for it deprives natural-gas companies of the only method contemplated by the Act for the changing of their rate schedules to meet shifting conditions

Sections 4(d) and 4(e) of the Act prescribe the steps which a natural-gas company must take in order to effect changes in its rates, charges, classifications and services. Section 4(d) provides that the company must file tariff changes with the Commission at least 30 days before the date on which the changes will go into effect. Section 4(e) of the Act permits the Commission to suspend the changed schedules but limits such suspension to a period of five months beyond the time when the changes would otherwise go into effect. Section 4(e) also provides:

> "* * * If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service *shall* go into effect. * * *" (Italics supplied.)

Panhandle complied with these requirements. On December 15, 1953, it filed new schedules canceling its I Schedules (R. 4268-4269), setting the effective date for the change as January 18, 1954. On January 15, 1954, the Commission suspended the revised tariff sheets and provided for a hearing on the proposed change in the consolidated proceeding involved in this

review (R. 4265-4276). That proceeding not having been concluded, and the statutory suspension period having expired on June 18, 1954, Panhandle's motion to make the proposed changes effective was filed on June 21, 1954 (R. 4294-4296). Thereupon, the revised tariff sheets filed by Panhandle went into effect and Panhandle's I Schedules were canceled. The Commission's order of July 15, 1954, purporting to deny that motion, flies squarely in the face of the provisions of the Act and is invalid. This invalid order was not cured by the Commission's subsequent order of July 28, 1954. That order did not purport to establish new I Schedules; instead, it merely sought to amend schedules which then did not exist (R. 3957-3958). The decision of the Court of Appeals would give body to an incomplete and ineffective act by the Commission. It would approve an intentional disregard of the orderly procedure contemplated by the Act.

The court below advanced only one reason for its approval of the denial by the Commission of Panhandle's motion to make effective its revised tariff sheets. It suggested that, since the I Schedules were a part of the tariff under which Panhandle was directed to operate by an order of the Commission in a prior consolidated proceeding, such schedules cannot be "collaterally nullified through the filing of a rate schedule change" (App. 9a). This suggestion is supported neither by precedent nor logic. If accepted, it means that a tariff, once approved for a natural-gas company by an order of the Commission, can not be changed by the company even though every step prescribed by the Congress in Section 4 of the Act is properly taken. The contention completely ignores the fact that rate schedules making up the filed

tariff of a natural-gas company are generally promulgated following full hearings before the Commission in which all interested parties participate. This is the first time to our knowledge that it has been suggested that prior proceedings would have to be opened in order to file new or modified schedules at later dates.

Both the court below and the Court of Appeals for the Fourth Circuit have previously concluded that the Commission does not have the right to prevent a natural-gas company from putting changes into effect at the end of the five-month period prescribed by Section 4(e) if the Commission has not in the meantime completed its hearing and made its order upon the changes. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (1953); *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (1953). Further, the lower court has expressly recognized the right of a natural-gas company to cancel its rate schedules even when such schedules have been imposed as a condition of a certificate. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (1953). The action of the lower court in the present case does not square with this decision or the decisions in the *Mississippi River* and *Atlantic Seaboard* cases, yet the lower court makes no attempt to distinguish them. We submit that the present decision is in direct conflict with the other applicable decisions.

Panhandle's revised tariff sheets in no way affect contract rights or other vested rights of any of its customers. In such a situation there can be no justification for the Commission's failure to follow the procedure provided by the Act. Under Section 4(e) the Commission had the power to review the revised tariff

sheets, and, if found to be unlawful, they could have been set aside. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation et al.*, 350 U.S. 332, 76 S. Ct. 373, 380 (1956). Instead of following this course of action available under the Act, the Commission chose to issue its unlawful order of July 15, 1954, purporting to deny Panhandle's motion to make effective its revised tariff sheets. The approval by the lower court of this unlawful action of the Commission fails to accord the proper consideration to the procedure which Congress has established for cases of this character. We do not understand the decision in *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 502, 75 S. Ct. 467, 473 (1955), to alter the requirement that the Commission act within the prescribed period if it desires that the change not become effective. In that case this Court did not have before it a motion filed under Section 4(e) and it did not discuss or consider the procedure under that section.

The decision of the lower court ignores completely the orderly procedure prescribed by the Act. Similarly, it ignores the recent observation of this Court that a natural-gas company has the power to establish "and change at will, the rates offered to prospective customers; * * *," subject to the observance by the company of the procedure outlined in Sections 4(d) and 4(e) of the Act. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation et al.*, 350 U.S. 332, 76 S. Ct. 373, 380 (1956). The decision creates the impossible situation under which natural-gas companies, having once accepted tariffs promulgated by the Commission, are stripped of their ability to change prospective services to be rendered under the tariffs,

regardless of operating or economic conditions which might require such changes. This Court should grant the petition for writ of certiorari and, upon its review, set at rest the questions created by the decision of the lower court.

CONCLUSION

The two questions presented by the decision below are of importance to the administration of the Natural Gas Act. They involve interpretations of the Act which are new, novel and erroneous. Settlement of these questions is in the public interest since they concern every natural-gas company making direct sales for consumption and every natural-gas company operating under tariffs defining prospective services to be offered by the company. For these reasons Panhandle prays that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,510

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Review of Orders of the Federal Power Commission

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Argued October 20, 1955
Before McLAUGHLIN, STALEY and HASTIE, Circuit Judges.

Opinion of the Court

(Filed April 27, 1956)

By McLAUGHLIN, Circuit Judge.

Petitioner seeks to have set aside two related orders of the Federal Power Commission dated July 15, 1954 and July 28, 1954 together with the Commission's Opinion No. 274 which accompanied the July 28th order. Though nine dockets are involved, all of the proceedings were consolidated by the January 15, 1955 order of the Commission under Docket No. G-2301.

Panhandle is a natural-gas company within the meaning of the Natural Gas Act, Section 2 (6), 15 U.S.C. 717a (6), as amended. On May 4, 1950 the Commission issued a certificate of convenience and necessity which allowed Panhandle to increase its capacity from 500,000 Mcf per day to 800,000 Mcf per day. Later, following hearings, by its

Opinion Nos. 214 and 214-A, 10 F.P.C. 185 and 322 (1951) the Commission fixed the form of tariff to be filed by Panhandle for its gas. In accordance with this Panhandle filed its tariff on August 17 and 30, 1951. The Commission order of March 5, 1952 designated the effective date of this as February 20, 1952. Against the opposition of Panhandle, the Commission included in the tariff three interruptible rate schedules, I-1, I-2 and I-3. Section 7 of these details a procedure for offering and curtailing gas under the schedules as follows:

> "Whenever Seller has gas available for sale in excess of that necessary to meet its firm and annual contract volume service requirements, it shall first offer such gas to its Buyers, which own or control storage facilities to the extent such Buyers contract to take such gas for storage, and shall then offer any remaining gas on an equitable basis to its other customers. The Service Agreement shall specify the maximum daily volume for such interruptible service. Service hereunder may be interrupted at any time and in any amount by Seller in a nondiscriminatory manner in its sole discretion after reasonable notice to Buyer and to direct customers. On any day for which Seller has ordered curtailment of service, in whole, or in part under this rate schedule, all gas taken by Buyer in excess of the curtailment shall be considered as delivered under Seller's applicable firm rate schedule."

Section 1.4 of the tariff's general terms and conditions defines "Buyer" as, "Buyer shall mean a purchaser of natural gas from Seller under a Service Agreement."

Panhandle made no attempt to obtain a rehearing from the Commission on its tariff or to review the action of the Commission. However, it has made no sales under its filed interruptible rate schedules and has refused to make such sales. In fact, it tried to dispose of its interruptible gas to new direct industrial customers, by establishing prefer-

ential classifications of service for such customers of higher priorities than the classifications available for resale customers under the tariff.

The first three of the dockets, Nos. G-2035, G-2049 and G-2050, have to do with three new direct customers of Panhandle, Mrs. Tuckers Foods, Inc., DeKalb Agricultural Assn., Inc. and Monroe Paper Products Co. Panhandle contracted with these industries to furnish them portions of its interruptible gas. In connection with this it applied to the Commission for disclaimers of jurisdiction or certificates of public convenience and necessity. There was a fourth application of the same kind, Docket No. G-2040, for service of gas to Bohn Aluminum & Brass Company, which company was succeeded by Bridgeport Brass Company. Later Panhandle withdrew its request in this docket for disclaimer of jurisdiction. The fifth Docket, No. G-2048, concerns petitioner's application for a certificate covering a new loop to its pipe line serving the area in the vicinity of the Bohn plant. This was designed for both Bohn and the local utility, Citizens Gas Fuel Company, a Panhandle resale customer. The Commission granted temporary authority in Docket Nos. G-2040 and G-2048 for construction and operation of the loop and to furnish up to 2,000 Mcf per day to Bohn, deliveries to be made subject to interruption and the authority subject to revision after hearing.

Docket No. G-2091 involves investigation by the Commission of direct sale of gas by petitioner to Mueller Brass Company without having first obtained appropriate certificate authorization and of other related matters. In Docket No. G-2301, the Commission on November 5, 1953 ordered Panhandle to show cause why it should not be required to sell interruptible gas to the franchise distributors in the various localities of the above mentioned industries whom Panhandle either intended to or was supplying gas direct. Thereafter Panhandle, on December 15 and 28, 1953, filed revised tariff sheets purporting to cancel

its interruptible rate schedules and revising connected tariff provisions. The Commission suspended these by its order of January 15, 1954, establishing Docket No. G-2349 for this cancellation proceeding. All of the dockets mentioned were consolidated for hearing. Included was the ninth Docket, No. G-2073. That concerned problems not urged as points of controversy here. Panhandle filed a motion to make its revised tariff effective. Argument was had on June 25, 1954.

On July 15, 1954, the Commission denied Panhandle's motion and on July 28, 1954 issued its Opinion No. 274 and accompanying order whereby it disallowed cancellation of petitioner's interruptible rate schedules as filed August 17 and 30, 1951; it modified and interpreted those schedules; it denied disclaimers of jurisdiction; it issued and denied certificates of public convenience and necessity and required the sale and delivery of natural gas for resale. Panhandle applied to set aside the July 15th order or for a rehearing. It also sought rehearing and stay of the order of July 28th. These were denied by the Commission on November 9, 1954 by an order which modified and affirmed Opinion No. 274 and the accompanying order.

Panhandle contends that the order of July 28, 1954 is invalid as a clear attempt to regulate direct sales. It argues at length that regulation of direct sales by the Commission is contrary to the Act. Actually, there is no dispute as to this. The Commission has not in the present proceedings asserted jurisdiction over direct sales of natural gas. It recognizes that Section 1(b) of the Act eliminates its jurisdiction in that respect.[1] And see Pan-

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[1] Section 1(b) of the Act reads as follows:

"The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

handle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951); Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949); Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947) and City of Hastings, Nebraska v. Federal Power Commission, 221 F. 2d 31 (D.C. App. 1954), cert. den. 349 U.S. 920 (1955). Nor is the Commission seeking to require Panhandle to make its rate schedule applicable to direct sales and thus to regulate those sales as in Colorado Interstate Gas Company v. Federal Power Commission, 185 F. 2d 357 (3 Cir. 1950).

What the Commission does say, and rightly we think, is that in considering the question of issuing a certificate of public convenience and necessity for the construction or operation of facilities for the transportation of natural gas to a new customer either direct or resale it, as part of the express certificate authority given it by Section 7(c) of the Act over the transportation of natural gas, is, among other things, fundamentally concerned with the effect the issuance of the certificate would have on the applicant pipe line's present service to its existing customers. This control over gas transportation by the Commission is completely independent of the sale of the gas and just as important. It is a separate subject of regulation irrespective of whether the particular gas is thereafter sold for resale or direct to consumers. Federal Power Commission v. East Ohio Gas Company, 338 U.S. 464, 468 (1950).

In both direct and resale transactions the gas must be transported and whatever the nature of the sale might be, it could affect the entire operation of the pipe line and its customers. The Commission's authority under the Act to issue transportation certificates where there were to be direct sales has never been questioned in court until now. Since 1943 it has passed on a hundred or more applica-

tions on the part of petitioner and other pipe line operators in the natural gas industry for permission to increase capacity for direct sales. This interpretation of its authority by the Commission through the years must be given considerable weight. Boehm v. Commissioner, 326 U.S. 287, 292 (1945); United States v. American Trucking Associations, Inc., 310 U.S. 534 (1940); Helvering v. Winmill, 305 U.S. 79, 83 (1938); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84 (1932). And where, with the Commission's position of record, Congress amended the Act, as it did, without changing that part of it so construed[2] implied approval of that interpretation is strongly evidenced. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 115 (1939); United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933). The sound principle behind the exercise of that control is reasonable safeguarding of a pipe line's customers. If acceptance by a pipe line of a large new direct consumer would seriously decrease and otherwise interfere with its existing service the Commission has had no hesitancy in refusing a certificate, especially, as the Commission said in City of Detroit v. Panhandle Eastern Pipe Line Company, 5 F.P.C. 43, 50 (1946), "[t]o the extent necessary to enable the Commission to protect the adequacy of service to its customers". Not only is this a sensible construction of the Commission's certificate jurisdiction under Section 7(c) but to hold otherwise would be to render the whole purpose of fair regulation in the public interest, the plenary reason for the Commission's existence, futile.[3]

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2 The Act was amended in 1954 by adding 1(c) thereto and back in 1947 there was an amendment to Section 7. Neither one of these restricted the above referred to interpretation of its authority by the Commission.

3 Section 7(c) reads in pertinent part:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities there-

The Commission, back in its 1946 report to the Congress, presented its position accurately when it said: "While the Commission does not have jurisdiction over direct sales to an industrial consumer as such, it does have the duty of protecting the public interest by preventing a natural gas company from using facilities subject to the Commission's jurisdiction for a purpose impairing ability to provide adequate and reasonable natural gas service to existing customers." And we find nothing in any of the situations before us justifying the conclusion that the Commission is endeavoring to extend its transportation authority to embrace control of direct sales. It has the right to issue a certificate allowing transportation of gas only when public convenience and necessity requires it. If the granting of a certificate would result in public inconvenience and is not required by public necessity then, irrespective of the method of disposal of the gas, the Commission could not properly allow the requested permission. The gas included eventually might be for resale or direct sale but the decision of the Commission must be rendered prior to any of the particular gas flowing through the pipe. That decision goes to the operation of the line itself. When the Congress gave the Commission control over the transportation of natural gas, it necessarily gave it control over the functioning of a pipe line's facilities. Since these are limited, new services must be subject to the Commission's authority if the latter is to be at all effective. Otherwise the Commission would be unable to enforce the mandate of Section 4(b) of the Act and a natural gas company, contrary to the there declared principles of the Act, would be able to "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disad-

for, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:"

vantage or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect as between localities or as between classes of service."

If the orders on review had failed to limit the priorities of interruptible service for direct sales to those available for the resale customers, Panhandle, by allowing higher priorities to its direct sale purchasers who constitute only 6% of its total volume of business, could preempt the entire interruptible capacity and leave the resale group without any of the excess gas at all. The resale buyers, saddled as they are with most of the cost of construction and maintenance of the transportation facility, are entitled to a reasonable amount of the I Schedule gas. This is the intent and accomplishment of the orders.

As to the gas allocated to petitioner for direct sale, the Commission has not fixed and has no wish to fix the rate at which it is to be sold. That is a matter for the various state regulatory bodies. Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra. But those tribunals in turn have no warrant to interfere in the Commission's allocations. If they had, the states would be forced to compete for the gas and petitioner would be free to sell its interruptible supply in those states offering it the greatest advantages. That is precisely the kind of situation contemplated by the Supreme Court in the Indiana case, supra, where it said at 332 U.S. 523:

> "* * * the matter of interrupting service is one largely related, * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states."

Panhandle also argues that its motion to make the revised tariff sheets effective should have been granted. It maintains that it followed the method outlined in Section 4(d) of the Act for a natural gas company to effect changes in its rates, charges, classifications and service;

that since the Commission did not enter an order disapproving the contemplated changes within the five months suspension period of Section 4(e) of the Act the revised sheets went into effect and its interruptible schedules were cancelled.

The contention is without merit and the cases cited by petitioner afford it no support. As we have already outlined, the interruptible schedules which petitioners sought to cancel by filing revised tariff sheets were filed by Panhandle because the Commission so ordered after a hearing at which the company had opposed them. Panhandle did not request rehearing or seek review of that order. It did seek and was allowed permission to construct and operate new pipe line facilities for an increased amount of gas. Conditioned to this allowance the Commission forced it to file a prescribed form of tariff which contained the interruptible schedules.[4] After the order had become final it could not be collaterally nullified through the filing of a rate schedule change. Section 4(d) of the Act is of no help to petitioner in its endeavor to so unilaterally destroy the order which had been arrived at after an adversary hearing and under which petitioner had been proceeding since its issuance. Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492, 502 (1955). What Section 4(d) provides is an alternative method of effecting changes otherwise permissible by virtue of the Act. Mobile Gas Corporation v. Federal Power Commission, 350 U.S. 332 (1956).

Lastly, complaint is made that the Commission was unreasonable in requiring petitioner to act under the interruptible schedules. This is an attempt by petitioner to retry a factual issue, completely ignoring the basic rule that such question is for the informed judgment of the

[4] The statutory authority for the attachment of such conditions to a certificate is Section 7(e). See Alabama-Tennessee Natural Gas Co. v. Federal Power Commission, 203 F. 2d 494, 497 (3 Cir. 1953).

Commission. Section 19(b) of the Act; Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 589 (1945); Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67 (1934); Manufacturer's Light and Heat Co. v. Federal Power Commission, 206 F.2d 404, 407 (3 Cir. 1953); Cities Service Gas Co. v. Federal Power Commission, 155 F.2d 694, 698-9 (10 Cir. 1946), cert. den. 329 U.S. 773.

The record is clear that the Commission did not act arbitrarily in refusing to allow petitioner to cancel its interruptible schedules. Though Panhandle lists several items in its statement wherein it alleges the unreasonable attitude of the Commission it argues only one, a claim that serious hazards would result from functioning under the interruptible schedules. This is at best conjectural. There is testimony that the types of difficulties petitioner urged can be overcome. The other specifications not argued have no real substance.

We are entirely satisfied that the Commission's orders of July 15, 1954 and July 28, 1954, with its Opinion No. 274 accompanying the latter, are justified by substantial evidence. The Commission by those orders is insisting that the petitioner properly perform its obligation to its existing customers. It is refusing to allow petitioner to avoid its responsibilities in that regard by selling all of its interruptible capacity directly to industry to the detriment of its resale customers and the consuming public. The control exercised is an integral part of the Commission's jurisdiction over the transportation of natural gas.[5] The orders will be affirmed.

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[5] Docket No. G-2048 covering the construction of the loop to petitioner's pipe line in the Bridgeport Brass Company plant area has the same ultimate problem as appears in the other dockets before us. That certificate of convenience and necessity was expressly conditioned upon (1) no further payments being made by Bridgeport or Citizens Gas Fuel Company for the construction of the loop and (2) accounting for their past payments on petitioner's books as a contribution in aid of construction. Petitioner's agree-

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,510

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

Present: McLAUGHLIN, STALEY and HASTIE, *Circuit Judges*.

Judgment

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of July 15, 1954 and July 28, 1954 of the Federal Power Commission be, and they are hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

April 27, 1956

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ment with Bridgeport and Citizens is that those companies reimburse it for the construction cost through additional charges on the gas delivered them. The temporary certificate was merely permissive, it did not force petitioner to construct the loop. The construction itself was subject to final action by the Commission.

The additional charges by petitioner to Bridgeport and Citizens are discriminatory and in violation of the Act. Section 154.21 of the Commission Rules, 18 C.F.R. 154.21. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951); McClellan v. Montana-Dakota Utilities Co., 104 F. Supp. 46 (D.C. Minn. 1952); Mondakota Gas Co. v. Montana-Dakota Utilities Co., 103 F. Supp. 666 (D.C. Mont. 1951). In its Opinion No. 274 the Commission makes it plain that the cost of the loop as a whole will be accounted for in Panhandle's rate base and given consideration in the normal depreciation process instead of it being borne exclusively by the two customers, Citizens and Bridgeport.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,510

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

Sur Petition for Rehearing

Present: McLAUGHLIN, STALEY and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

McLAUGHLIN
Circuit Judge.

Dated:
June 5, 1956

Statute Involved

Section 1. "(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (52 Stat. 821 (1938); 15 U.S.C. § 717(b))

Section 2. "(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." (52 Stat. 821 (1938); 15 U.S.C. § 717a)

Section 4. "(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." (52 Stat. 822 (1938); 15 U.S.C. § 717c)

Section 4. "(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders

with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." (52 Stat. 822 (1938); 15 U.S.C. § 717c)

Section 7. "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdic-

tion of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." (52 Stat. 824 (1938); 15 U.S.C. § 717f)

Section 19. "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the

Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28." (52 Stat. 831 (1938); 15 U.S.C. § 717r)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 369

PANHANDLE EASTERN PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion, findings, and orders of the Federal Power Commission (R. 645a-684a, 703a-708a, 826a-828a) are not reported. The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 232 F. 2d 467.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1956 (Pet. App. 11a), and a petition for rehearing was denied on June 5, 1956 (Pet. App. 12a).

The petition for a writ of certiorari was filed on August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction to determine priorities of service for transportation in interstate commerce of natural gas destined for direct sales to industrial consumers.

2. Whether a natural gas company may, by invoking the procedures of Sections 4(d) and 4(e) of the Natural Gas Act, permanently cancel a rate schedule notwithstanding the Commission's determination made after appropriate hearings that the cancellation would be unjustified.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth in the Appendix, *infra*, pp. 19-22.

STATEMENT

On July 15, and July 28, 1954, the Federal Power Commission issued two orders against Panhandle Eastern Pipe Line Company, a natural-gas company subject to Commission regulation under the Natural Gas Act, in consolidated proceedings involving nine dockets. All of the dockets involved Panhandle's attempts to carry out its program of securing the "cream of the volume business" by selling natural gas directly to large industrial consumers on an interruptible basis[1]

[1] Gas sold on an interruptible basis is gas in excess of the firm requirements of a pipeline system and ordinarily sold subject to interruption when necessary to meet firm demands.

rather than selling its available interruptible gas to its utility customers for resale to such industrial consumers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329, 330-331, 333-34. Panhandle sought review of these orders in the court below and the Court of Appeals affirmed. The facts pertinent to the issues Panhandle seeks to raise here may be summarized as follows:

In 1951, the Commission issued to Panhandle a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, authorizing the construction and operation of facilities increasing Panhandle's capacity from 500,000 to 800,000 Mcf per day, *Re Panhandle Eastern Pipe Line Company*, 9 F.P.C. 721. This authorization was conditioned on Panhandle's filing with the Commission a specifically prescribed form of tariff. In August 1951, Panhandle filed a tariff in substantial compliance with the Commission's direction and the Commission permitted it to become effective as of February 20, 1952. *Re Panhandle Eastern Pipe Line Company*, 10 F.P.C. 185 and 322.

In order to assure that Panhandle utilized the gas in accordance with the purposes for which the certificate was authorized, Section 16 of the General Terms and Conditions of the tariff established a priority in service of the gas transported:

> 16.1 *Firm Service.* Firm Service rendered by Seller to its Buyers or to residential and commercial customers served directly by Seller shall have priority over all other services rendered by Seller.
>
> 16.2 *Storage Service.* Service rendered by Seller under the obligations of the Storage Service Rate Schedule and Storage Service Agreement shall

have priority over all service rendered by Seller on an interruptible basis.

16.3 *Interruptible Service.* Interruptible Service rendered by Seller shall be the first to be curtailed in the event the demands on Seller's system for firm service and for storage service shall exceed available deliverable supplies. (R. 551a-552a).

Tied in with Section 16 and an integral part of the tariff were three interruptible rate schedules, I-1, I-2, and I-3,[2] Section 7 of which provided:

Whenever Seller has gas available for sale in excess of that necessary to meet its firm and annual contract volume service requirements, it shall first offer such gas to its Buyers, which own or control storage facilities to the extent such Buyer contract to take such gas for storage, and shall then offer any remaining gas on an equitable basis to its other customers. * * * (R. 531a).

Although during the hearings it had opposed the inclusion of any interruptible rate schedules in its tariff, Panhandle did not seek either Commission rehearing or court review of these schedules. Despite its filing of the schedules, Panhandle made no sales of interruptible gas under them to the distributing companies which purchased their firm gas from Panhandle for resale to ultimate consumers (R. 134a, 136a).[3] Instead, Pan-

[2] These rate schedules were identical except for price which varied with the zone for which the schedule was available.

[3] Some few of Panhandle's resale customers were permitted to purchase interruptible gas but Panhandle claimed that these purchases were under another schedule. Panhandle made but very few of these sales and, under its construction, the sales when made were entitled to a lower priority than interruptible sales (R. 44a-145a). See *infra*, pp. 5-6.

handle sought to transport and sell gas to a number of new direct industrial customers.

Four of the dockets here involved concerned situations where Panhandle had entered into contracts with new direct industrial customers (Mrs. Tucker's Foods, Inc., DeKalb Agricultural Ass'n, Monroe Paper Products Co., and Bohn Aluminum & Brass Company) for service to them of gas in excess of its firm requirements. These industrial customers were located within the franchise area of a purchasing distributing company and deliveries to the industrial plants were to be made through the facilities of the distributing companies. In each case, Panhandle applied to the Commission for disclaimers of jurisdiction, or, in the alternative, for certificates of public convenience and necessity pursuant to Section 7(c) of the Act, *infra*, pp. 21-22.[4] In another of the consolidated dockets, the Commission had instituted an investigation into Panhandle's transportation of gas for direct sale to Mueller Brass Company without having first obtained an appropriate certificate authorization (R. 648a).

Another phase of the consolidated proceeding stemmed from the circumstance that, in serving some of these new direct customers and others, Panhandle had been making, and proposed to make, the gas available to these direct customers under two classifications of service priorities, "superior interruptible" or "firm industrial" service, and "dump" service in addition to

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[4] Still another of the dockets involved Panhandle's application for a certificate authorizing construction of a new loop to its pipeline serving the area in the vicinity of the Bohn plant and designed to serve Bohn and the local utility, a Panhandle resale customer (R. 646a).

those set out in Section 16 of the General Terms and Conditions, *supra*, pp. 3-4 (R. 6a-8a, 658a-659a). The "superior interruptible service" was in effect interposed between the storage and interruptible classification and so had a higher priority than "interruptible service," (R. 44a, 658a-659); the "dump service", also available to direct customers as well as a few resale customers, had a lower priority than "interruptible gas" (R. 145a).

When these consolidated proceedings came before it, the Commission, in November 1953, consolidated them with an additional proceeding in which the Commission directed Panhandle to show cause why it should not be required to sell natural gas to the distributing companies within whose franchise areas Panhandle's new industrial customers were located so that they would make the sales to the industrial customers (R. 807a). In its order, the Commission pointed out that the record previously made showed (1) that "Panhandle in proposing the direct sales had ignored the provisions of Section 7 of its interruptible rate schedules * * *" (R. 804a) and (2) that "in at least the one instance in which there was presented the testimony of a customer utility serving the franchise area in which a direct sale was proposed to be made, Panhandle refused to make sales of natural gas * * * under its interruptible schedule, stating that it was not selling 'I' schedule gas. Instead Panhandle entered into an arrangement with the utility whereby the utility would transport to Panhandle's direct sale customer the volume of natural gas Panhandle was proposing to

sell" (R. 804a).[5] The Commission further stated (R. 805a):

> With respect to Panhandle's proposals to make direct sales within the franchise areas of its utility customers, we believe that the necessity for such arrangements should not result from Panhandle's refusal to sell natural gas to its resale customers under its interruptible rate schedules so that it may render the service as a direct sale. * * *

Thereafter, on December 15 and 28, 1953, prior to the date set for hearing on the show cause order, January 5, 1954, Panhandle filed with the Commission revised tariff sheets constituting notice of cancellation of its interruptible rates (R. 808a, 812a-822a.) The Commission, on January 15, 1954, directed that this new application also be consolidated with the prior proceedings. Pending decision thereon, the Commission suspended the proposed cancellation (R. 808a-812a). Subsequently, on June 21, 1954, Panhandle moved, purportedly under Section 4(e) of the Act, *infra*, pp. 20-21, that the cancellation be made effective (R. 823a-826a); the Commission denied the motion, stating that the interruptible rate schedules were an integral part of the form of tariff prescribed by the Commission as a condition of its permitting Panhandle a major increase in capacity in 1951, and that condition may not be nullified by a notice of cancellation of the rate schedules (R. 827a-828a).

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[5] The Presiding Examiner had found this to be the situation in the case of Panhandle's proposed sale to Bohn. (R. 663a-665a, 726a-727a).

In passing on the merits of the various matters raised, the Commission denied Panhandle's request for disclaimers of jurisdiction (R. 675a). The Commission went on to issue certificates of public convenience and necessity for the transportation of natural gas to Mrs. Tucker's Products and to DeKalb (R. 660a-661a, 675a-677a).[6] The Commission, however, refused Panhandle's application for authority to transport gas to Bohn, and instead directed Panhandle to deliver the gas to the resale customer under its interruptible rate schedule (R. 663a-665a, 677a-678a). It also denied the application to transport gas to Monroe Paper for the reason that it was not justified by public convenience and necessity (R. 661a-663a). The Commission, in addition, ordered Panhandle not to use its facilities for transporting gas to Mueller without requisite commission authorization (R. 667a-668a, 679a-680a).

Further, the Commission disallowed Panhandle's proposed cancellation of its interruptible rate schedules (R. 648a-657a, 678a-679a.) Because of evidence that a few storage customers could pre-empt all interruptible gas that became available (R. 79a-80a), the Commission also directed that Section 7 of the interruptible schedules be amended, to provide for a reservation of 20% of excess gas for storage customers as opposed to the complete overriding priority for storage use contained in the original schedules. The modified Section 7 further was to provide that gas remaining after the reservation for storage purposes should be allotted equally

[6] The certificate to serve DeKalb was granted on the condition that the state commission file with the Power Commission a certificate under Section 1(c) of the Act, *infra*, p. 19, recognizing and affirming its jurisdiction over the distributing company's transportation of the gas (*ibid.*).

between Panhandle's direct and its resale customers (R. 680a-684a).

Finally, to eliminate Panhandle's interposition of "superior interruptible service" above "interruptible service," with the former representing higher priority, the Commission's order provided (R. 678a):

> (M) Panhandle shall render no service to either its direct or resale customers under classifications of service not provided for in Section 16 of the General Terms and Conditions of its FPC Gas Tariff, Original Volume No. 1.

On rehearing, the Commission amended paragraph (M) to read (R. 707a-708a):

> (M) The facilities of Panhandle shall not be employed to transport gas either to its direct or resale customers under priorities not provided for in Section 16 of the General Terms and Conditions of its FPC Gas Tariff, Original Volume No. 1.

ARGUMENT

To achieve its admitted purposes of selling gas "at the highest price possible to industry and retain[ing] the profits" and of "get[ting] substantially higher prices than [it could] for regulated gas" (R. 617a, 619a), Panhandle has for some time embarked on a program of making direct sales of gas to industrial customers without regard either to the industrial customer's location within the franchise area of Panhandle's resale customers or the obvious adverse effect upon the resale customer and the latter's rates to the ultimate domestic consumers. In furtherance of this program, Panhandle has refused to sell interruptible gas to its

resale customers for industrial resale under its interruptible rate schedules, even though the Commission had approved a major increase in Panhandle's capacity on the condition that such schedules be made effective.

In this case, the Commission, asserting its jurisdiction over the "transportation of natural gas in interstate commerce" (Section 1(b), *infra*, p. 19), has, with the approval of the court below, denied Panhandle permission to perform the transportation of such gas necessary to consummate some of these sales, blocked Panhandle's attempt to cancel the interruptible rate schedules, and to the extent appropriate has required Panhandle to transport interruptible gas to its resale customers for sale to the industrial customers. The Commission's actions are, we believe, well within its authority under the decisions of this Court and, accordingly, there is no occasion for further review.

1. (a). Panhandle bases its attack on the Commission's orders primarily on its claim that the Commission has in effect undertaken to regulate "sales to direct customers," a matter clearly excluded from Commission regulation under Section 1(b) of the Act, *infra*, p. 19. See *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507. But the Statement, *supra*, pp. 8-9, amply demonstrates that the Commission has undertaken to regulate solely the transportation of gas to Panhandle's proposed direct industrial consumers,[7] and not the rates, terms or conditions of the sales to these industrial customers. The issue here is solely whether the regulation of such trans-

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[7] Contrary to Panhandle's suggestion (Pet. 11-12), the development of paragraph M (*supra*, p. 9) shows that the Commission intended only to regulate the transportation of natural gas.

portation, including the etsablishment of priorities, is within the Commission's authority.

The Act and the pertinent decisions leave no doubt that the Commission has such power. Section 1(b), *infra*, p. 19, vests in the Commission jurisdiction over interstate transportation of natural gas as well as over sales in interstate commerce for resale. Section 7(c), *infra*, pp. 21-22, implements this authority over interstate transportation by requiring that a natural-gas company obtain a certificate of public convenience and necessity from the Commission before it engages in the interstate transportation of natural gas or operates interstate transportation facilities. And in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, this Court held that, although East Ohio made no sales for resale in interstate commerce, East Ohio nevertheless was a natural-gas company, subject to the Natural Gas Act by virtue of its transportation of gas in interstate commerce (338 U. S. 468):

> * * * As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 516, § 1(b) made the Natural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act. * * *[8]

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[8] The so-called Hinshaw bill which added Section 1(c) to the Act (see *infra*, p. 19) merely exempts from the Act companies operating entirely within a state and completely regulated by a state com-

Not only do the Act and this Court's decisions make it clear that interstate transportation of gas is an independent basis of Commission jurisdiction, but the Commission has also consistently taken this position. "Since 1943, it has passed on a hundred or more applications on the part of petitioner and other pipeline operators in the natural gas industry for permission to increase capacity for direct sales. This interpretation of its authority by the Commission through the years must be given considerable weight." (Pet. App. 5a-6a).[9]

Sound practical considerations support the regulation of interstate transportation of gas independently of sales for resale. Regulation of sales for resale is concerned primarily with the reasonableness of the rate and the continuity of the particular service involved. Regulation of transportation, on the other hand, calls into play different and more far-reaching considerations; only a limited amount of gas can travel through a pipeline system, and control over the allocation of this limited supply, as between the various states and various classes of service, is essential to ensure that the pipeline facilities are operated in the interest of the general public, including direct industrial as well as ultimate domestic customers. To except the trans-

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mission, even though such companies are engaged in interstate transportation. The independent jurisdiction of the Federal Power Commission over transportation, however, was left unaffected, and it is significant that petitioner does not attempt to distinguish *East Ohio*.

[9] It is noteworthy that in this very case Panhandle applied to the Commission for disclaimer of jurisdiction, or, alternatively, for certificates of public convenience and necessity to undertake the transportation of gas necessary to effectuate its proposed direct industrial sales.

portation of such gas destined for direct sales from Commission regulation would mean, in the words of the court below, that "Panhandle, by allowing higher priorities to its direct sale purchasers who constitute only 6% of its total volume of business, could pre-empt the entire interruptible capacity and leave the resale group without any of the excess gas at all" (Pet. App. 8a), despite the fact that it is the resale customers who bear most of the cost of the transportation facilities. It was in light of these considerations that the Commission took its actions in this case and established priorities under which Panhandle should furnish interruptible gas to all customers, direct and resale, on an equitable basis.

Moreover, effective control of interstate transportation regardless of its ultimate disposition, is necessary for the Commission to carry out its statutory mandate under Section 4(b), *infra*, p. 20:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Here, the Commission found that maintenance of priorities of service for direct sale customers different from those set forth in petitioner's filed schedules would be "unjust, unreasonable, unduly discriminatory, preferential and unlawful" and that cancellation of these

schedules "would result in undue prejudice and disadvantage to its resale customers." (R. 674a.) These conclusions, the Court of Appeals expressly and correctly held, were "justified by substantial evidence" (Pet. App. 10a.)

(b). Contrary to petitioner's assertion (Pet. 15), the holding below does not conflict with *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329. In that case, this Court merely sustained the power of a state commission to require a pipeline company to obtain a state certificate of public convenience and necessity before making direct sales to industrial consumers within the franchise areas of local utilities. The Power Commission did not participate nor was it a party to that case and the Court did not purport to pass on the Power Commission's authority (341 U.S. at 336):

> * * * The statutory scheme of "dual regulation" might have some overlaps or conflicts but no such exigencies appear here. There are no opposing directives and hence no necessity for us to resolve any conflicting claims as between state and federal regulation.

See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473-474.

Here, as in the *Michigan Public Service* case, there does not appear to be a conflict between state and federal directives. Apart from the fact that a certificate of public convenience and necessity is permissive and not mandatory, it is significant that, while it issued certificates to Panhandle to make the direct industrial sales here involved, the Michigan Public Service Com-

mission has, in the instant proceedings, stated that it did so on Panhandle's representation that no gas was available under the interruptible gas schedules; the state commission has taken the position that if Panhandle does have interruptible gas in its pipeline it should be made available to the distributing companies for resale in their franchise areas (R. 731a, 772a).

In any case, should conflicting directives result under the scheme of dual regulation contemplated by the Natural Gas Act, it is clear that state authority must yield. *Federal Power Commission* v. *East Ohio Gas Co., supra* at 473-474; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 510. As pointed out by this Court, Congress has appropriately lodged in the Power Commission the responsibility of accommodating conflicting state and customer interests in the allocation of natural gas. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 332 U.S. 507, 523.

2. As part of its effort to free its transportation of interruptible gas for direct sales from federal regulation, Panhandle has attempted to cancel the rate schedules establishing priorities of service for such transportation, which it had filed in compliance with the conditions of the Commission's grant in 1951 of authority to increase its capacity. See *Re Panhandle Eastern Pipe Line Co.*, 10 F.P.C. 185 and 322. Panhandle has enjoyed the benefits of the certificate issued and has been operating thereunder. Since, as we have shown, the Commission had jurisdiction to determine those priorities, the Commission's blocking of that attempt was also within its authority.

(a). Panhandle sought to invoke Section 4(d) of the Act, *infra*, p. 20, in order to cancel these interruptible rate schedules. The revised sheets were suspended by Commission order of January 15, 1954, "until such time as said revised tariff sheets may be made effective in the manner prescribed by the Natural Gas Act and Panhandle may be authorized to operate in the fashion contemplated by such revised tariff sheets" (R. 808a-812a).

In so acting, the Commission properly regarded the proposed cancellation as beyond the scope of Sections 4(d) and 4(e). Panhandle did not request rehearing or seek review of the 1951 order under which the interruptible rate schedules were filed. Instead, it took advantage of its benefits by constructing and operating, as thus authorized by the Commission, new pipe-line facilities substantially increasing the capacity of its interstate system. Sections 4(d) and 4(e) are of no help to Panhandle in its endeavor to nullify a condition of a certificate of public convenience and necessity issued pursuant to Section 7 by an order which has long since become final and not subject to collateral attack. For, paraphrasing the language of this Court in *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 502: "After the" certificate was issued "on that condition" Panhandle "sought no review of it. On the other hand" Panhandle "has enjoyed the benefits" of the certificate "ever since." "It cannot now be allowed to attack an officially approved condition of the" certificate "while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold because it is not made in the" certificate "proceeding but is attempted in a sep-

arate rate proceeding." And, since in any event, Panhandle was not making any sales of interruptible gas pursuant to these schedules, Panhandle plainly suffered no injury as a result of the Commission's refusal to make the notice of cancellation temporarily effective.

(b). Moreover, even if Section 4(e) were applicable and the Commission should have permitted the cancellation to become effective, pending the Commission's decision, after the 5 months suspension period provided in that Section, the Commission's subsequent order denying cancellation on the merits was clearly effective to reinstate the schedules. While Section 4(e) provides that a rate change proposed by a natural-gas company may become effective after five months, the meaning of that Section is that the rate change becomes effective only on a provisional basis and is subject to modification and even revocation in accordance with the Commission's ultimate decision on the merits. This is clear from the further provision in the Section that, when the rate change goes into effect prior to final Commission decision, the company may be required to furnish a bond to refund any amounts ordered by the Commission, and to refund, upon final decision, the excessive portion, if any, of the increase. Thus, the fact that a proposed rate change may become effective under Section 4(e) does not in any way bar the Commission, upon making appropriate findings, from reinstating the pre-existing rate. By the same token, even if Panhandle's proposed cancellation had become effective under Section 4(e), the Commission nevertheless could reinstate the schedules when it ultimately concluded, as it did here, that the schedules should remain effective.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1956.

APPENDIX

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides, in pertinent part, as follows:

Section 1. * * *

(b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c). The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. * * * [1952 ed., Supp. II]

Section 2. * * *

(6). "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4. * * *

(b). No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * * * *

(d). Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. * * *

(e). Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. * * *

Section 7. * * *

(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in

force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly. * * *

* * * * *

(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 369

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION AND
MICHIGAN CONSOLIDATED GAS COMPANY, *Respondents*

BRIEF OF MICHIGAN CONSOLIDATED GAS COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI

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BRIEF OF MICHIGAN CONSOLIDATED GAS COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 232 F. 2d 467 and is reprinted in an appendix to the petition for certiorari (Pet. App. 1a)[1] Opinion No. 274 of the Federal Power Commission and its accompanying order (R.

[1] The petition for certiorari will be referred to as "Pet. ——" and the appendix thereto as "Pet. App. ——." References to the joint appendix prepared for the court below and filed in this Court will be designated "R. ——."

3923-62), and the Commission's order on rehearing (R. 3991-94) are not officially reported.

JURISDICTION

Petitioner sought review in the court below under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717 r(b), and seeks further review in this Court under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

1. Whether the interstate transportation of natural gas for proposed delivery directly to industries is within the Federal Power Commission's jurisdiction under Section 1(b) of the Natural Gas Act.

2. Whether petitioner may ignore the condition of its outstanding Section 7(c) certificates that the facilities thereby authorized cannot be used for service to any new customer without the approval of the Commission.

3. Whether, when a provision of petitioner's tariff has been made a specific condition of its outstanding Section 7(c) certificates, petitioner may cancel that provision without requesting or obtaining any modification of the condition, and whether, in any event, the issue is now moot.

STATEMENT

Panhandle Eastern Pipe Line Company ("Panhandle") here seeks further review of two orders of the Federal Power Commission issued July 15 and July 28, 1954, respectively, and its related Opinion No. 274, and of the decision of the United States Court of Appeals for the Third Circuit affirming those orders.

Respondent, Michigan Consolidated Gas Company ("Michigan Consolidated"), was an intervenor in the proceedings before the Commission and upon review in the Court of Appeals. Michigan Consolidated is a public utility supplying gas to Detroit and other important cities in Michigan and obtains a substantial portion of its gas supply from Panhandle. It is thus vitally affected by the matters here sought to be raised.

The orders of the Commission here involved relate to nine separate dockets, which had been consolidated for hearing. All involve some aspect of Panhandle's long, determined effort to sell its available interruptible gas (*i.e.*, gas in excess of that necessary to supply the firm contract demands of its utility customers) directly to large industrial consumers rather than to its local utility customers for resale to such industrial consumers. The first five dockets involved applications by Panhandle for authorization by the Commission to serve gas directly to four industrial consumers, each of which is located within the distribution area of one of Panhandle's utility customers.[2] A sixth docket, No. G-2091, was an investigation into Panhandle's practices with regard to direct sales, including the question whether Panhandle was violating the Natural Gas Act by supplying gas directly to an industrial consumer (Mueller Brass) without first obtaining a certificate of convenience and necessity from the Commission.

In a seventh docket, No. G-2031, the Commission ordered Panhandle to show cause why Panhandle

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[2] Dockets Nos. G-2035 (Mrs. Tucker's Products Division); Nos. G-2040 and G-2048 (Bohn Aluminum); No. G-2049 (De Kalb Agricultural Ass'n.); and No. G-2050 (Monroe Paper Products).

should not supply interruptible gas to its utility customers in accordance with its effective resale interruptible rate schedules ("I Schedules"). In an obvious attempt to avoid showing cause, Panhandle shortly thereafter filed a Notice of Cancellation of its I Schedules, whereupon the Commission suspended the Notice and scheduled the matter for hearing in the eighth docket, No. G-2349.[3]

These proceedings were consolidated for hearing, and oral argument was heard on June 25, 1954. In the meantime, on June 21, 1954, Panhandle filed a motion in Docket No. G-2349 to make the cancellation of its I Schedules effective. This motion was denied by the Commission's order of July 15, 1954 (R. 4329-30). Thereafter, on July 28, 1954, the Commission issued the principal order here involved and its accompanying Opinion No. 274 (R. 3923-62).

By the order of July 28, 1954 the Commission (1) denied Panhandle's attempted cancellation of its I Schedules, although prescribing certain modifications of the schedules; and (2) adhered to its long established position that Panhandle cannot use its pipeline facilities to transport gas for delivery to a new direct sale customer without authorization by the Commission. The Court of Appeals unanimously affirmed both orders and denied Panhandle's petition for rehearing.

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[3] The ninth docket, No. G-2073, involved an investigation in which the Commission found that Panhandle's practice of selling excess gas to East Ohio Gas Company ("East Ohio") and Ohio Fuel Gas Company ("Ohio Fuel") under Section 6.1(b) of Panhandle's LS-1 rate schedule instead of under its I Schedule was discriminatory and "palpably unlawful" (R. 3935). Panhandle did not seek review of this aspect of the orders in the court below.

Panhandle has now abandoned its contention in the court below that the I Schedules are "unworkable" but still contends that the Commission here regulated direct sales contrary to Section 1(b) of the Act. Panhandle seeks, in addition, to review the order of July 15, 1954 denying Panhandle's attempt to make its cancellation of the I Schedules effective prior to the Commission's final order, which found that the proposed cancellation would be contrary to the public interest.

THE BACKGROUND OF THE PROCEEDINGS BELOW

The proceedings of which Panhandle now seeks review are but the latest manifestation of a broad program that company has pursued for many years, and a full understanding of the case requires a brief explanation of that program. Under Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), a gas pipeline company's rates to local utilities for gas which will in turn be resold to consumers are subject to regulation by the Federal Power Commission, while the pipeline company's charges for gas sold directly to ultimate consumers are not.

Panhandle has long pursued the policy of attempting to sell its available interruptible gas directly to industrial consumers while refusing to sell any of such gas to its utility customers for resale. Panhandle openly admits that its policy is designed to escape regulation of its charges by the Commission. In one proceeding Panhandle's President testified, for example, that his company wants to sell gas "at the highest price possible to industry and retain the profits" (R. 3746) and that "the only reason we are working on

the direct gas is that we can get substantially higher prices than we can for regulated gas." (R. 3748)

Panhandle pursues its "direct sale" program in two steps. First, it refuses to sell any interruptible gas to its utility customers, such as Michigan Consolidated, so that the utilities have insufficient gas available to supply industrial consumers within their respective service areas (R. 3929). Second, Panhandle then approaches these industries with an offer to supply them with gas directly from its pipeline at prices not subject to the Commission's jurisdiction (R. 3942-3).

Panhandle's program has been the subject of extended proceedings before the Commission and the courts and has uniformly been found contrary to the public interest. In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, for example, this Court pointed out the adverse effects of Panhandle's policies upon local utilities as follows:

> "If service to any substantial number of industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies." (332 U.S. at 521, note 19)

In its subsequent decision in *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 329, this Court reviewed and condemned Panhandle's attempt to sell gas directly to Ford Motor Company instead of selling such gas to Michigan Consolidated for resale to Ford, stating:

"A substantial portion of Consolidated's revenues is derived from sales to large industrial consumers. Appellant ignored requests of Consolidated for additional gas to meet the increased wants of its industrial customers. Instead of attempting to meet increased needs through Consolidated, appellant launched a program to secure for itself large industrial accounts from customers, some of whom were already being served by Consolidated. (341 U.S. at 333)

* * * * *

"Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whom were already being served by Consolidated." (341 U.S. at 334)

Because a pipeline company's attempt to skim off the "cream of the volume business" thus seriously affects the utility customers who support the pipeline by their firm demands, the Commission has for a number of years adopted two requirements with respect to sales of interruptible gas by pipeline companies. First, it has required Panhandle as well as other natural gas companies to file tariffs containing "I Schedules" under which utility customers are entitled to their fair share of the available interruptible gas. Second, the Commission has for many years required pipeline companies to obtain certificates of convenience and necessity for the transportation of natural gas for delivery to new direct sale customers, and the Commission has permitted such service only when required by the public interest. In the Commission and court below, Panhandle sought to avoid both requirements.

1. The "I Schedule" Issue

When Panhandle was granted a certificate of convenience and necessity in 1950 authorizing a major expansion of its pipeline capacity, the Commission reserved for later decision the question of the form of tariff to be adopted by Panhandle, and the filing of a satisfactory tariff was made one of the conditions of the certificate. Thereafter, when the Commission's staff proposed a form of tariff containing I Schedules requiring sale of interruptible gas to utility customers, Panhandle strenuously objected to the inclusion of that provision.

After hearing all interested parties, the Commission rejected Panhandle's objections and prescribed resale interruptible I Schedules as part of Panhandle's tariff. Section 7 of these schedules provided that:

> "Whenever Seller [Panhandle] has gas available for sale in excess of that necessary to meet its firm and annual contract volume service requirements, it *shall first offer* such gas to its Buyers [utilities], which own or control storage facilities to the extent such Buyers contract to take such gas for storage, and shall then offer any remaining gas *on an equitable basis* to its other customers." (10 F.P.C. at 215)[4]

Panhandle did not apply for rehearing or seek judicial review of the Commission's action, but filed tariffs including the prescribed I Schedules effective as of February 20, 1952 (R. 2865-70).

Contrary to its obligations under its filed tariffs and the Act, and despite repeated requests by Michigan Consolidated for interruptible gas, Panhandle thereafter refused to sell any of such gas to its utility cus-

[4] Emphasis is supplied throughout this brief.

tomers (R. 3927). At the same time, Panhandle adhered to its policy of making direct sales of such gas to industrial consumers located within the distribution areas of its utility customers. Upon hearing evidence of Panhandle's actions, the Commission issued an order requiring Panhandle to show cause why it should not abide by its tariff. That order pointed out that it has become "abundantly apparent" that "Panhandle in proposing the direct sales has ignored the provisions of Section 7 of its interruptible rate schedules" and has "refused to make sales of natural gas to that utility under its interruptible schedule" (R. 4262).

Faced with the fact that it had no defense to the show cause order, Panhandle then filed a proposal to cancel its I Schedules, reciting the same objections it had advanced to the adoption of the schedules in the first place (R. 4265). The Commission suspended the cancellation and, after a full hearing, concluded that Panhandle's reiterated objections to the I Schedules were without merit (R. 3926-37).

Upon review, the court below found that this question was one for the informed judgment of the Commission, that the Commission clearly had not acted arbitrarily and that Panhandle's only real objection was "at best conjectural" (Pet. App. 10a). Panhandle has not renewed its argument in this Court and has thus abandoned its claim regarding this aspect of the Commission's order of July 28, 1954.[5]

[5] Panhandle has, however, renewed its attack upon the Commission's order of July 15, 1954 refusing to permit Panhandle to make cancellation of its I Schedules effective prior to final decision of the Commission (Pet. 16-21). See discussion *infra*, pp. 20-22.

2. The Jurisdictional Issue

As has been stated, the Commission has consistently required pipeline companies to obtain certificates of public convenience and necessity to transport gas for delivery to direct sale customers. The Commmission's long exercise of this authority and Congressional approval of that policy will be outlined below.

Notwithstanding this requirement of the Natural Gas Act, Panhandle, without applying for authorization to do so, commenced direct sales of gas in 1951 to Mueller Brass Company at Port Huron, Michigan, in the distribution area of Southeastern Michigan Gas Company. In its order of July 28, 1954, the Commission accordingly found that Panhandle "continually violated the Natural Gas Act since November 15, 1951" (R. 3953).

Panhandle did apply to the Commission for authority to make direct sales to Bohn Aluminum and Brass Company at Adrian, Michigan, or for a disclaimer of jurisdiction. There, it developed that Citizens Gas Fuel Company, the local utility, had attempted to obtain interruptible gas from Panhandle for resale to Bohn, but Panhandle had refused its request and "coerced" Citizens into a three-way arrangement under which Panhandle would sell interruptible gas directly to Bohn, using Citizens' facilities (R. 4037). The Trial Examiner referred to this action by Panhandle as an "outright violation of its filed Tariff" and the appropriation of "an industrial customer rightfully belonging to Citizens" (R. 4038).

Panhandle's applications to supply gas directly to Monroe Paper Products Co., to De Kalb Agricultural

Association, Inc. and to Mrs. Tucker's Products Division are further examples of its direct sale policies.

In each case the Commission exercised jurisdiction over the proposed transportation of gas for delivery directly to industrial customers, granting the application for a certificate of public convenience and necessity in two cases and denying certificates in the others.

Upon review, the Court of Appeals rejected Panhandle's contention that the Commission had thereby regulated direct sales contrary to Section 1(b) of the Natural Gas Act and upheld its authority to require certificates of public convenience and necessity to transport gas for delivery to any new customer, direct or resale. Panhandle here seeks further review of that question.

ARGUMENT

I.

THE COMMISSION HERE PROPERLY EXERCISED ITS JURISDICTION OVER THE TRANSPORTATION OF NATURAL GAS

Panhandle claims that the decision of the court below sustains regulation by the Commission of direct sales to industrial consumers contrary to Section 1(b) of the Natural Gas Act. Section 1(b) states:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

As Section 1(b) makes clear, the Act applies both "to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale." In *Federal Power Commission* v. *East Ohio Gas Company*, 338 U.S. 464, 468, this Court pointed out that "throughout the Act 'transportation' and 'sale' are viewed as *separate* subjects of regulation" and that "they have *independent* and equally important places in the Act." This Court therefore held that because the Commission has independent authority over the interstate transportation of natural gas "it is immaterial" whether such gas is subsequently sold "direct to consumers rather than for resale" (338 U.S. at 473).[6]

Panhandle's argument here is a direct negation of this conclusion. Reduced to its essentials, Panhandle's claim is that under Section 1(b) the Commission not only has no authority over the direct sale itself—to which all agree—but is without control over the interstate transportation of the natural gas if it is destined to be delivered to direct sale customers. Thus, Panhandle would split the transportation of gas by an interstate pipeline into two segments, only one of which would be subject to control by the Commission. This attempt to bifurcate the Commission's jurisdiction over the interstate transportation is contrary to the

[6] In adopting the so-called Hinshaw Amendment of March 27, 1954 (68 Stat. 36), adding Section 1(c) to the Act, Congress made no change in the Act affecting the above interpretation, but simply exempted from the Act companies operating entirely within a State even though such companies are engaged in the transportation of interstate gas. It was never suggested that the Commission's independent jurisdiction over the transportation of natural gas by interstate pipeline companies should be limited. See H.R. Rep. No. 899, 83rd Cong., 1st Sess., p. 2.

plain language of the Act and the long and consistent interpretation of the Commission, reported to and impliedly approved by Congress.

The Commission's position in this respect was fully stated as early as 1946 in its opinion in *City of Detroit et al.* v. *Panhandle Eastern Pipe Line Company et al.*, 5 F.P.C. 43. There, as here, Panhandle contended that it could commence deliveries to a new direct sale customer (Ford Motor Company, one of Michigan Consolidated's largest customers) without obtaining any authorization from the Commission. In rejecting this contention, the Commission pointed out that, without attempting to regulate direct sales as such, it has complete authority over the use of Panhandle's transportation facilities, "especially to the extent necessary to protect the adequacy of service to its [existing] customers." 5 F.P.C. at 50.[7]

In its Annual Report to Congress for 1946, the Commission discussed this decision in detail and stated (p. 97):

> "While the Commission does not have jurisdiction over direct sales to an industrial consumer as such, it does have the duty of protecting the public interest by preventing a natural gas company from using facilities subject to the Commission's jurisdiction for a purpose impairing ability to provide adequate and reasonable natural gas service to existing customers."

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[7] The Commission subsequently granted Panhandle's petition for rehearing and set aside the order accompanying this opinion pending further hearings. 5 F.P.C. at 508. Panhandle then withdrew its application for authority to serve Ford, and the proceedings were therefore terminated. 6 F.P.C. 551.

The Commission has been called upon repeatedly to exercise the authority thus reported to Congress. Indeed, since 1943 there have been more than 100 cases (listed in an appendix to this brief) in which the Commission has required certificates for the use of pipeline facilities to transport gas for delivery to new direct sale customers.

As this Court has repeatedly held, such a uniform and long established interpretation of an act by the agency charged with its administration is entitled to great weight.[8] Moreover, when such an administrative interpretation is made known to Congress, which subsequently amends the statute without changing the provision thus interpreted, there is an implied approval by Congress of that interpretation.[9] Both of these principles apply here.[10]

The effect of withdrawing the Commission's authority over the transportation of gas to direct sale customers, as Panhandle seeks to do, would be to emasculate the Commission's efforts to regulate a pipeline's service to its resale customers. These proceedings provide an excellent illustration of that fact. Since 1952, Panhandle has been under the legal obligation of offering an equitable share of its available interruptible gas to its resale customers under its I Schedules. It has

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[8] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84; *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Boehm* v. *Commissioner*, 326 U.S. 287, 292.

[9] *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115; *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466.

[10] In addition to the Hinshaw amendment of March 27, 1954, see footnote 6, *supra*, Congress amended Section 7 of the Act on July 25, 1947 to give pipeline companies the right of eminent domain (61 Stat. 459).

flatly refused to do so and has instead sold the gas illegally to new direct sale consumers, such as Mueller Brass, and to other industrial consumers under what Panhandle chooses to call a "superior interruptible" type of service (R. 3937). This simply means that any interruptible gas that became available was offered first to these favored direct sale customers, with the result that none was ever offered to Panhandle's utility customers.

If Panhandle can add more such direct sale customers at will, and can supply them with interruptible gas on a more favorable basis than that offered resale customers, it is obvious that the latter will continue to be discriminated against, contrary to Section 4(b) of the Act. While Panhandle has not questioned the Commission's finding that this constitutes undue discrimination, Panhandle contends that the Commission is powerless to stop such discrimination because of the direct sale exemption. But what Panhandle resolutely ignores is the fact that direct sale customers, quite as much as resale customers, can be supplied only through its transportation facilities. And there can be no doubt that the Commission's authority over the utilization of those facilities is plenary.

The Natural Gas Act specifically provides the means by which the Commission shall effectuate that authority. Section 7(c) prohibits a pipe line company from engaging in any transportation of natural gas in interstate commerce or in the operation of any of its facilities for such purpose without first obtaining a certificate of public convenience and necessity "authorizing such acts or operations." Section 7(e) then provides that the Commission shall grant such a certificate only if it finds that the proposed operation "is or will

be required by the present or future public convenience and necessity."

Panhandle states that its applications here involved do not require the construction of new facilities and therefore "cannot impair the Commission's regulation of transportation" (Pet. 16). This contention ignores the fact that under Section 7 of the Act the Commission has authority not only over the construction and extension of pipeline facilities but also over the *operation* of those facilities after they are built. One of the most important facets of the Commission's regulation of transportation is the allocation of a pipeline company's necessarily limited capacity among its customers. *Michigan Consolidated Gas Company* v. *Federal Power Commission* (C.A.-3), 203 F. 2d 895, 900. The fact that no new construction is involved is wholly irrelevant.

The decisions relied upon by Panhandle were all cited in the court below and are entirely consistent with that court's decision. Indeed, the case principally relied upon, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357, was decided by the same court. There, the court merely held that a pipeline company could not be required to make its rate schedule applicable to direct sales. The case did not in any way involve the scope of the Commission's certificate authority over the interstate transportation of natural gas, which is the issue here.

Panhandle argues that the Commission's requirement that it provide in its I Schedules that interruptible gas supplied to both direct and resale customers must be curtailed upon a "non-discriminatory and nonpreferential basis" is an application of its tariff to di-

rect sales, contrary to the *Colorado Interstate* case (Pet. 13). But the provision referred to simply requires that, when reduction of loads *on the pipeline system* is required, Panhandle may not discriminate against its resale customers and in favor of direct sale customers by any such device as a "superior interruptible service" classification.[11] Panhandle's argument amounts to the claim that the Commission lacks authority to prevent discrimination by a pipeline company among its customers because some are served directly. This argument is clearly wrong. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U.S. 635, 647. As the Court of Appeals for the Sixth Circuit stated in this regard:

> "Whatever may be the limits placed by the Act upon the authority of the Commission in other respects, it is clear that under § 4(b) the authority of the Commission, in respect to undue preferences or advantages, is without limitation." *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 173 F. 2d 784, 789.

Panhandle also cites *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 329, one of the cases in which this Court rejected Panhandle's attempts to avoid state regulation of its direct sales. See also, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507. Panhandle seems to be arguing that because, as this Court there held, state commissions have authority over direct sales of natural gas as such, the Federal Power Commission is stripped of its juris-

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[11] As a matter of fact, the curtailment provisions of Panhandle's tariffs have always applied to direct as well as resale customers (R. 2880).

diction over the interstate *transportation* of gas for delivery to direct sale customers. But this Court made clear in both decisions that the contrary is true. In the *Indiana* case, it was pointed out that, while the state commission has jurisdiction over the rates charged in direct sales, the transportation of the gas is "within the jurisdiction of the Federal Power Commission to control." 332 U.S. at 523. And in the *Michigan* case, where this Court was advised by the Commission that "it has exercised in multitudinous instances authority over transportation for direct sales to consumers," 341 U.S. at 338, the Court held that the exercise of such authority by the Federal Power Commission was not affected by the certificate requirement of the Michigan statute, 341 U.S. at 336.

Panhandle's claim (Pet. 14-15) that the Commission has ignored or disregarded the action of the state commission simply is not true, nor is there "confusion and conflict." As Panhandle itself points out, the local authorities resolve the issue of whether a particular direct sale serves the local convenience and necessity. But those authorities do not and cannot determine whether the interests of the public served by the interstate pipeline system as a whole permit the uses that the company wishes to make of the gas, which is the issue decided by the Federal Power Commission. As the court below pointed out:

> "[State regulatory bodies] have no warrant to interfere in the Commission's allocations. If they had, the states would be forced to compete for the gas and petitioner would be free to sell its interruptible supply in those states offering it the greatest advantages." (Pet. App. 8a)

Panhandle also cites, but does not discuss *Federal Power Commisison* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498 and *City of Hastings* v. *Federal Power Commission* (C.A. D.C.), 221 F. 2d 31. Both decisions were also cited in the court below; neither touches the question here involved. The former involved the question whether the Commission had *implied* authority over the transfer of gas leases, in view of the production and gathering exemption of Section 1(b) of the Act. The Commission's action here, on the other hand, rests on its *express* authority over the transportation of gas. The *Hastings* case involved the question whether the Commission could regulate the *rates* for gas sold directly for consumption because commingled with resale gas. Neither decision is remotely in point.

There is another circumstance, which the court below did not find it necessary to discuss, that in and of itself supports the Commission's exercise of authority in this case. Since 1946, every certificate of public convenience and necessity issued to Panhandle for the construction of new facilities had contained a condition that the facilities being authorized could not be used for the transportation of gas to any new customers without prior authorization of the Commission.[12]

Under Section 7(e) of the Act the Commission is expressly authorized to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[12] See orders of April 23, 1946 (5 F.P.C. 476), June 4, 1946 (5 F.P.C. 544), August 9, 1946 (5 F.P.C. 685), November 30, 1946 (5 F.P.C. 949), June 10, 1948 (7 F.P.C. 704), and May 4, 1950 (9 F.P.C. 721, 740).

Since Panhandle accepted certificates embodying this condition and is enjoying the benefits of those certificates, it cannot now ignore the condition. This is clear from the decision of this Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. See also *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission* (C.A.-3), 203 F. 2d 494, 497.

While this conclusion rests in part on estoppel, it is also based upon the principle that the Commission alone has the power to determine whether and upon what conditions certificates of public convenience and necessity shall be issued. In advancing its present contentions, Panhandle is thus asking this Court to disregard the condition in Panhandle's outstanding certificates requiring Commission approval before the facilities may be used to transport gas for delivery to any new customer. The orders issuing such certificates to Panhandle have long since become final and are not before this Court for review. And even if they were, the Court could not do what Panhandle asks, since this would be tantamount to the issuance by the Court of new certificates without the condition. *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 20-21.

II.

THE COMMISSION PROPERLY DENIED PANHANDLE'S MOTION TO MAKE THE CANCELLATION OF ITS I SCHEDULES EFFECTIVE AND THE ISSUE IS NOW MOOT.

Panhandle argues as a separate proposition (Pet. 16-21) that the Commission's order of July 15, 1954 denying Panhandle's motion to make effective the proposed cancellation of its I Schedules was invalid. It is contended that the five-month statutory period for

which the Commission may suspend a change in rates under Section 4(e) of the Act expired on June 18, 1954 and that the Commission was without power to deny Panhandle's motion to make the cancellation of its I Schedules effective. While this contention is without merit as we hereinafter show, the issue sought to be raised is now moot.

As has been pointed out (*Supra*, p. 19), the Commission, in authorizing Panhandle's last major expansion program, prescribed, *as a condition of the certificate*, the form of Panhandle's tariff, including the I Schedules.[13] When Panhandle filed its instant proposal to cancel the I Schedules, the Commission on January 15, 1954 issued an order (R. 4265-67) in which it pointed out that Panhandle had failed "to apply for concomitant modification of its outstanding certificate authorization" and that "Panhandle may not change, amend, modify, or cancel the form of its tariff" without prior approval of the Commission. Accordingly, the Commission suspended Panhandle's proposed cancellation of its I Schedules until such time as Panhandle "may be authorized to operate in the fashion contemplated by" such cancellation. The Commission thus pointed out that its authority to suspend Panhandle's instant filing was not limited to the five-month period prescribed in Section 4(e) of the Act, since the form of tariff including the I Schedules had been prescribed as a condition of Panhandle's certificate.

Having accepted the certificate, with the above condition, Panhandle could not properly ignore the condi-

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[13] See *Michigan Consolidated Gas Company* v. *Federal Power Commission* (C.A.-3), 203 F. 2d 895.

tion and insist that under Section 4(e) of the Act it was entitled to make the cancellation effective at the expiration of the five-month period. This is clear from this Court's decision in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 348 U.S. 492. See also *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission* (C.A.-3), 203 F. 2d 494, 497.

While there is thus no merit in Panhandle's objections to the Commission's July 15, 1954 order denying its motion, this issue is now moot in any event.[14] Panhandle cannot question the Commission's authority to deal with the merits of Panhandle's proposal by its subsequent order of July 28, 1954 regardless of the propriety of Panhandle's motion. Section 4(e) of the Act specifically provides that "after full hearings, either completed before *or after* the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." This provision completely refutes Panhandle's contention (Pet. 18) that the Commission loses its authority to act when the suspension period has ended.

Panhandle made no sales of interruptible gas under its I Schedules during the short period between the filing of its motion on June 21, 1954 and the issuance of the Commission's order on July 28, 1954, dealing with the merits of Panhandle's proposal (R. 3927).

[14] *See Michigan Consolidated Gas Company* v. *Federal Power Commission* (C.A.3), 203 F. 2d 895, 899.

CONCLUSION

Panhandle's petition for certiorari satisfies none of the standards under which this Court exercises its certiorari jurisdiction. The petition is simply a last attempt further to prolong practices that were long ago found to be contrary to the public interest, and it questions an authority that the Commission has exercised without challenge for more than a decade. The petition for certiorari should be denied.

Respectfully submitted.

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APPENDIX

Proceedings in Which the Federal Power Commission Has Asserted Jurisdiction Over the Transportation of Natural Gas to Direct Sale Customers of Natural Gas Companies

Louisiana-Nevada Transit Company, 2 F.P.C. 546 (1939), affirmed, *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (1940)

Panhandle Eastern Pipe Line Company, 3 F.P.C. 1005 (1943)

Colorado Interstate Gas Company, 3 F.P.C. 1021 (1943)

Panhandle Eastern Pipe Line Company, 3 F.P.C. 1088 (1943)

Northern Natural Gas Company, 4 F.P.C. 415 (1943)

El Paso Natural Gas Company, 4 F.P.C. 878 (1945)

El Paso Natural Gas Company, 4 F.P.C. 881 (1945)

Greenfield Gas Company, Inc., and Greenfield Gas Company, Inc. v. *Panhandle Eastern Pipe Line Company; Panhandle Eastern Pipe Line Company; Eastern Indiana Gas Company*, 4 F.P.C. 1010 (1945)

Northern Natural Gas Company, 4 F.P.C. 1075 (1945)

City of Detroit, et al. v. *Panhandle Eastern Pipe Line Company, et al.*, 5 F.P.C. 43, 50 (1946)

Natural Gas Pipeline Company of America, 5 F.P.C. 519 (1946)

Cities Service Gas Company, 5 F.P.C. 571 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 580 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 581 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 734 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 813 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 873 (1946)

Arkansas Louisiana Gas Company, 5 F.P.C. 876 (1946)

Natural Gas Pipeline Company of America, 5 F.P.C. 934 (1946)

Arkansas Louisiana Gas Company, 6 F.P.C. 300 (1947)

Kansas-Nebraska Natural Gas Company, 6 F.P.C. 368 (1947)

Consolidated Gas Utilities Corporation, 6 F.P.C. 454 (1947)
Gas Transport, Inc., 6 F.P.C. 461 (1947)
Northern Natural Gas Company, 6 F.P.C. 641 (1947)
El Paso Natural Gas Company, 6 F.P.C. 670 (1947)
Panhandle Eastern Pipe Line Company, 6 F.P.C. 688 (1947)
Southern Natural Gas Company, 7 F.P.C. 636 (1948)
Southern Natural Gas Company, 7 F.P.C. 1006 (1948)
Northern Natural Gas Company, 7 F.P.C. 1068 (1948)
Panhandle Eastern Pipe Line Company, 7 F.P.C. 1121 (1948)
East Tennessee Natural Gas Company, 8 F.P.C. 836 (1949)
Louisiana-Nevada Transit Company, 8 F.P.C. 904 (1949)
Alabama-Tennessee Natural Gas Company, 8 F.P.C. 1300 (1949)
Panhandle Eastern Pipe Line Company, 9 F.P.C. 584 (1950)
Northern Natural Gas Company, 9 F.P.C. 706 (1950)
Cities Service Gas Company, 9 F.P.C. 822 (1950)
Texas Gas Transmission Corporation, 9 F.P.C. 901 (1950)
Southern Natural Gas Company, 9 F.P.C. 988 (1950)
Acme Natural Gas Company, 9 F.P.C. 993 (1950)
Transcontinental Gas Pipe Line Corporation, 9 F.P.C. 1319 (1950)
Transcontinental Gas Pipe Line Corporation, 9 F.P.C. 1327 (1950)
Texas Gas Transmission Corporation, 10 F.P.C. 689 (1951)
Montana-Dakota Utilities Company, 10 F.P.C. 697 (1951)
Montana-Dakota Utilities Company, 10 F.P.C. 698 (1951)
Texas Gas Transmission Corporation, 10 F.P.C. 738 (1951)
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 369

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER PANHANDLE EASTERN PIPE LINE COMPANY

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REPLY BRIEF FOR PETITIONER PANHANDLE EASTERN PIPE LINE COMPANY

ARGUMENT

The briefs of the Commission and of Michigan Consolidated fail to come to grips with the grounds advanced by Panhandle in its petition for writ of certiorari. Those grounds present a compelling case for the review by this Court of the decision of the court of appeals.

THE ORDER OF THE COMMISSION IS A REGULATION OF DIRECT SALES, INCLUDING SALES MADE FOR MANY YEARS

The Commission and Michigan Consolidated argue repeatedly and with many variations that the Commission has an "independent" control over gas transportation despite its lack of jurisdiction over direct sales. They next *assume* that the order of July 28, 1954 (R. 3923-3962), regulates the transportation of gas and thus falls within the Commission's jurisdiction. This is a convenient assumption, but it does not square with the facts. The obvious intent and actual effect of the Commission's order is to regulate Panhandle's direct sales, including sales established before the enactment of the Natural Gas Act. The order will not change the transportation of gas in Panhandle's lines nor its physical facilities for such transportation.

Panhandle does not attempt to "bifurcate the Commission's jurisdiction over the interstate transportation" of gas (Mich. Con. Brief, p. 12). The regulation of direct sales cannot be characterized as a regulation of transportation and thus avoid the restrictions placed upon the Commission's jurisdiction by Congress. The actual impact of the Commission's order of July 28, 1954, is to regulate Panhandle's direct sales; and the impact of an administrative order is the essential element upon which its validity must be tested. We have pointed out (Petition, pp. 11-12) one glaring instance of the Commission's unwarranted effort to characterize its regulation of Panhandle's direct sales as a regulation of transportation. The evolution of Paragraph (M) of the Commission's orders of July 28, 1954 (R. 3957), and

November 9, 1954 (R. 3994) is revealing. The Commission and Michigan Consolidated choose to ignore this record fact, although the Commission in a footnote protests, with little conviction and no support in the record or elsewhere, that the development of Paragraph (M) really shows that the Commission intended to regulate only the transportation of gas (Comm. Brief, p. 10). Similarly illustrative of the true impact of the order is the evident fact that the Commission was not concerned with the transportation of gas when it brushed aside the determinations of the state and local authorities and decided that the Monroe sale would eliminate an air pollution problem for only a portion of the City of Monroe (R. 3941) and thus would not be "in the public interest." Michigan Consolidated simply ignores these facts of record in its brief (Mich. Con. Brief, p. 18), while the Commission does not even discuss the Monroe sale.

Paragraph 7 of the I Schedules, as amended by the Commission in its order of July 28, 1954, will apply and regulate *all* direct sales of Panhandle (Petition, pp. 12-14), even those made prior to the enactment of the Act. The impact of the order is not confined to sales proposed now or to be proposed in the future. The order, if permitted to stand, will destroy or curtail Panhandle's long-established direct sales, many of which Panhandle has served since prior to the passage of the Natural Gas Act. This proposed regulation cannot be based upon any certificate condition, because those sales were never sought to be subjected to any such condition. The record does not contain any evidence, and indeed there could be none, under which the burden of this order can be justified as a protection of Panhandle's resale

service. It does not regulate transportation. The essential fact is that if this order is sustained, the Commission can, by indirection and at will, nullify the clear intent of Congress as expressed in Section 1(b) of the Act.

The Authorities Do Not Support the Commission's Assertion of Power Over Direct Sales

Both the Commission and Michigan Consolidated lean upon the statement of the court below (App., 5a-6a) regarding applications "for permission to increase capacity for direct sales," and Michigan Consolidated has included in the appendix to its brief a list of proceedings to support the Commission's action here. They fail, however, to report that every one of those cases involved a matter clearly under the Commission's jurisdiction, such as a certificate for transportation facilities, the abandonment of resale service, or other jurisdictional matters. None involved an effort to subject long-established direct sales to regulation. They do not supply any pattern of administrative conduct which can support the Commission's self-extension of its power into fields withheld by the Act. Further, it is fundamental that an administrative agency is not the final judge of the limits of its power, and even the repeated assumption of power which has not been granted does not bind the courts. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 66 S. Ct. 637 (1946); *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627, 53 S. Ct. 768 (1933). This is particularly true where, as here, the agency was concurrently requesting the Congress to give it such power. In its Annual Reports to Congress for 1952 and 1953, the Commission recommended that Section 1 of the Act be amended "so as to vest juris-

diction in the Commission over direct sales in interstate commerce of natural gas for industrial use." Thirty-second Annual Report of the Federal Power Commission, p. 152; Thirty-third Annual Report of the Federal Power Commission, p. 154. The Congress did not see fit to accept this recommendation and the Commission did not repeat it in its Annual Report for 1954. In this state of facts, the "re-enactment" principle has no possible application.

Not a single decision upholding either a direct or an indirect effort of the Commission to regulate or prohibit direct sales has been cited by the Commission or Michigan Consolidated. This case presents the only instance where, to our knowledge, such an effort has been made since the lower court itself struck down the Commission's direction that a natural-gas company make its tariff applicable to direct sales. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (1950). The distinction offered by the lower court (App., 5a), and echoed by Michigan Consolidated (Mich. Con. Brief, p. 16), that the *Colorado* case involved only an effort to control rates for direct sales is not sound, because the order of the Commission there under review, just like the present order, would have subjected direct sales to the general provisions of the tariff. The court did not strike down only the attempted application of the rate provisions; it struck down the whole order. The Act denies the Commission power over direct sales, not just the rates for direct sales. Prior to the *Colorado* case the nearest approach to an effort by the Commission to control direct sales appears to have been in the opinion accompanying its order of March 14, 1956, in *City of Detroit* v. *Panhandle Eastern Pipe*

Line Co., 5 F.P.C. 43 (1946). But, as Michigan Consolidated (Mich. Con. Brief, p. 13) acknowledged, that order was subsequently set aside by the Commission itself. Further, the Commission there observed that "its action in this matter is not to be construed as an attempt to assert jurisdiction over a direct sale of gas" (5 F.P.C. 50).

The efforts of the Commission and Michigan Consolidated to avoid the controlling decisions in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 68 S. Ct. 190 (1947), and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 71 S. Ct. 777 (1951), are not persuasive. Those cases lay down the rule that Congress has left the regulation of direct sales with the states. In the *Indiana* case, this Court sustained the state's regulation of established direct service, and in the *Michigan* case this Court upheld the right of the state to require new service to conform to its regulatory procedure. The Commission and Michigan Consolidated imply that in the *Indiana* case the Court held that the Commission's jurisdiction over transportation permits it to regulate direct sales. What this Court said, by way of dicta, is that, although direct sales have been intentionally left to state regulation, conflicts among the various states could be accommodated through the Commission's jurisdiction over transportation. In the present proceedings there is no conflict between states, and the Commission did not purport to find any, thus there is no possible basis for the Commission's attempt to regulate or prohibit Panhandle's direct sales on that theory.

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S. Ct. 266 (1950), from which both the Commission and Michigan Consolidated seek support, does not even get close to the question of direct sales. All that was decided there was that a company transporting natural gas in an uninterrupted stream in interstate commerce was, at the time of that decision, a natural-gas company even though it operated in one state only. Subsequently, Congress enacted the Hinshaw Act (68 Stat. 36, 15 U.S.C.A. 717 (Supp. 1954)) to make more clear and fully effective its intent to leave the regulation of local utilities, even though they transport gas in an interstate stream, solely with the states. The intent to exclude direct sales from any control by the Commission is already clear in the Act, and the Commission's disregard of that intent is a reach for power which must not be permitted to succeed. The phrase "subject to the jurisdiction of the Commission" appears repeatedly throughout the Act in the definitions of the powers and functions of the Commission. The apparent view of the Commission and Michigan Consolidated that only the rates for direct sales are beyond the Commission's control fails to respect the specific words of the Act.

Both the Commission and Michigan Consolidated seek to avoid the controlling principle affirmed in *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31 (1954), *cert. denied*, 349 U.S. 920, 75 S. Ct. 660 (1955), although Michigan Consolidated attempts to distinguish the case by saying that it raised only the issue of the power to regulate rates for direct sales of gas. There are no grounds for distinguishing that case from the present one. The

Commission's lack of power to regulate direct sales rates stems only from the broad exclusion in Section 1(b). That exclusion encompasses *all* phases of direct sales.

Certificate Conditions Can Only be Imposed Within the Statutory Limits of the Commission's Powers

Michigan Consolidated contends that conditions expressed in some of the certificates heretofore issued Panhandle for the construction of certain facilities subject any new direct sale to Commission jurisdiction. Although the elements of estoppel are not present, that theory, at least in part, appears to be the basis of Michigan Consolidated's contention. But Michigan Consolidated fails to observe that such conditions apply only to sales for resale. This Court is not being asked to strike down or disregard conditions. Panhandle merely asks that the lawful meaning of those conditions be preserved and that the Commission be prevented from fastening an interpretation upon them which would carry the Commission's powers beyond their statutory limits. Unless the conditions apply only to the "sale of natural gas, *subject to the jurisdiction of the Commission,*" as the Commission originally specified, 5 F.P.C. 47, they exceed the Commission's power and are void. The Act does not exclude from the Commission's power only direct sales which were being made when it was enacted; it excludes *all* direct sales, new and old alike. The Commission cannot, by conditions or otherwise, extend its authority into a field which Congress has withheld. *Stark* v. *Wickard*, 321 U.S. 288, 64 S. Ct. 559 (1944); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311, 51 S. Ct.

159 (1931); *International Ry. Co.* v. *Davidson*, 257 U.S. 506, 42 S. Ct. 179 (1922). It may not exercise a lawful power in such a manner as to accomplish an unauthorized purpose. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 31 S. Ct. 288 (1911).

Neither the Commission nor Michigan Consolidated contend that Paragraph (M) of the order of July 28, 1954, or the Commission's attempted amendment of Paragraph 7 of Panhandle's I Schedules (R. 3960) are based upon certificate conditions. Yet, the attempted amendment and Paragraph (M) of the order would cause all direct sales of Panhandle to be regulated by the Commission, many of which antedate not only the certificate proceedings but also the enactment of the Natural Gas Act.

The contention that direct sales may be regulated under the Commission's power to prohibit undue discrimination is equally unsound. The record does not support any allegation that undue discrimination has resulted, or will result, from Panhandle's direct sales. But even if it did, the power granted by Section 4(b) of the Act to prohibit undue discrimination is limited to matters *within the Commission's jurisdiction* and will not support an order on a matter excluded from its power by the express words of the Act. The scope of these provisions is well discussed in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 675 (1953).

THE COMMISSION UNLAWFULLY DENIED PANHANDLE'S MOTION TO MAKE EFFECTIVE ITS REVISED TARIFF SHEETS WHICH CANCELLED THE I SCHEDULES

Neither the Commission nor Michigan Consolidated mentions the decisions in *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 202 F. 2d 899 (1953), or *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 201 F. 2d 568 (1953), although they are in direct conflict with the present decision of the lower court. None of the cases relied upon by the Commission or Michigan Consolidated in their effort to find support for the order of July 15, 1954, and the Commission's subsequent modification of the I Schedules so as to make them apply to long-established direct sales, involved a motion filed under Section 4(e) of the Act. None of them alters in any way the rule of the *Mississippi River* and the *Atlantic Seaboard* cases.

In Panhandle's petition to this Court (Petition, p. 18-20), we pointed out that the present case was the first time to our knowledge that it has been suggested that prior proceedings would have to be opened in order to file new or modified schedules at later dates. If accepted, that proposition means that a tariff once approved for a natural-gas company by an order of the Commission cannot be changed by the company even though every step required by Section 4 of the Act is properly taken. This could not have been the intention of Congress when it enacted the Act. Michigan Consolidated and the Commission offer no legislative history or precedent to support their contentions to the contrary. As a matter of fact, *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494, 497 (1953), a decision by

the lower court which is cited by Michigan Consolidated, recognizes the right of a natural-gas company to change, pursuant to 4(d), its tariff promulgated by order of the Commission as a condition to a certificate.

The contentions that Panhandle is not aggrieved by the order of July 15, 1954, and that the issue raised with respect to that order is moot, are totally unsound. They are bottomed on a refusal to recognize the actual tenor of the order of July 28, 1954, as it relates to the I Schedules. Panhandle's motion to make the proposed changes effective was filed on June 21, 1954 (R. 4294-4296), in strict compliance with Section 4(e), and the revised tariff sheets thereupon went into effect and cancelled Panhandle's I Schedules. The order of July 28, 1954, did not purport to promulgate or reinstate those schedules as the Commission here suggests. It purported to amend a part of schedules not then existing. It follows that the portions of the order of July 28, 1954, relating to such schedules were nullities (R. 3957-3958). The Commission could not amend or modify something which did not then exist. The order of July 28, 1954, was not one which could be made legally under the provisions of Section 4(e) because it was not an order that could "be proper in a proceeding initiated after" the cancellation of the I Schedules "had become effective."

More important, from the standpoint of the far-reaching impact of this part of the order upon Panhandle and natural-gas companies generally, it purported to modify a resale tariff so as to make it applicable to direct sales, existing and prospective. This is directly opposed to the decision in the order

of October 23, 1953, in Panhandle Eastern Pipe Line Company, Docket G-1767, one of the Dockets initially in this consolidated proceeding, in which it was held that the I Schedules apply only to sales for resale and not to direct sales. The Commission's action here under review thus is contrary to its own prior action and the substantive and procedural provisions of the Act. Certainly it does not fall within the scope of *any* condition ever established by the Commission. There is, therefore, no substance in any of the arguments advanced in support of the Commission's action. It cannot fairly be permitted to stand.

MICHIGAN CONSOLIDATED'S ATTEMPTS TO MISLEAD

In a transparent effort to prejudice Panhandle's petition before this Court, Michigan Consolidated has indulged in a studied misstatement of the record. We do not intend to dissipate the time of this Court with a point-by-point refutation. However, we will set straight as briefly as possible several of the most glaring and unfair distortions advanced in the brief of Michigan Consolidated.

Michigan Consolidated charges Panhandle with a "broad program" of starving its utility customers by selling gas directly to industries (Mich. Con. Brief, pp. 5-7). Panhandle has more than 50 utility customers who obtain their supplies of natural gas from Panhandle. Yet only Michigan Consolidated makes this charge. It is false. If it were true, other utility customers would certainly be protesting the cancellation of Panhandle's I Schedules. Quite to the contrary, they advised the Commission that the I Schedules are not needed (Ex. 46, R. 2597-2620). This is the clearest kind of proof that Panhandle is neither "starving" them nor raiding their markets.

The fact is that Panhandle is way down the list among natural-gas companies in the volume of direct sales. Whereas such sales constitute approximately 6% of Panhandle's total volume of business, they make up more than 50% of the business of Lone Star Gas Company, Arkansas Louisiana Gas Company and Mississippi River Fuel Corporation, almost 50% of the business of United Gas Pipe Line Company, and approximately 30% of the business of Cities Service Gas Company and Southern Natural Gas Company (Ex. 51, R. 2636).

The charge that Panhandle's alleged "direct sale program" has "uniformly been found contrary to the public interest" is also false (Mich. Con. Brief, p. 6). The state commissions which have jurisdiction of such sales have found them, including every one of the sales here involved, to be in the public interest. Certainly this Court has not condemned Panhandle's direct sales; it has merely held them to be subject to the full regulatory power of the local authorities. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 68 S. Ct. 190 (1947); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 71 S. Ct. 777 (1951).

Michigan Consolidated knows that the Commission did not approve or adopt the Examiner's erroneous version of the facts leading to the contracts with Bohn and Citizens Gas in Dockets G-2040 and G-2048 (Mich. Con. Brief, p. 10). The reason why the Commission did not do so is clear in the record. The specific statements of Mr. Gmeiner, President of Citizens Gas (R. 915-922), spotlight the Examiner's error.

Michigan Consolidated knows that under the Commission's rate-making practices as applied to Panhandle, direct sales carry more than their pro rata share of the cost of service. Michigan Consolidated also knows that all of Panhandle's sales are subject to regulation, either by the Commission or by the states. Its distortion of this factual situation is indicative of the complete lack of sincerity in its position throughout this proceeding.

CONCLUSION

The questions presented by the decision of the court of appeals are of substantial importance to the administration of the Natural Gas Act. The decision below is in direct conflict with the applicable decisions of this Court and of lower courts. Panhandle accordingly respectfully requests that this Court grant its petition for writ of certiorari and review this case.

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